

which the business could have provided had the injury not occurred.

(b) Loan proceeds may not be used to:

(1) Refinance indebtedness which you incurred prior to the disaster event;

(2) Make payments on loans owned by another federal agency (including SBA) or a Small Business Investment Company licensed under the Small Business Investment Act;

(3) Pay, directly or indirectly, any obligations resulting from a federal, state or local tax penalty as a result of negligence or fraud, or any non-tax criminal fine, civil fine, or penalty for non-compliance with a law, regulation, or order of a federal, state, regional, or local agency or similar matter;

(4) Repair physical damage; or

(5) Pay dividends or other disbursements to owners, partners, officers or stockholders, except for reasonable remuneration directly related to their performance of services for the business.

PART 124—MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS PROTEST AND APPEAL PROCEDURES

Subpart A—Minority Small Business and Capital Ownership Development

Sec.

124.1 Scope of regulations.

124.2 Associate Administrator for Minority Small Business and Capital Ownership Development.

124.3 Division of Program Certification and Eligibility.

124.4 Commission on Minority Business Development.

124.5 Violations.

124.6 Penalties for misrepresentations and false statements.

124.7 Restrictions on fees for applicant and Participant representatives.

124.100 Definitions.

124.101 The 8(a) program: General eligibility.

124.102 Small business concern.

124.103 Ownership requirements.

124.104 Control and management.

124.105 Social disadvantage.

124.106 Economic disadvantage.

124.107 Potential for success.

124.108 Additional 8(a) program eligibility requirements.

124.109 Ineligible businesses.

124.110 Program term.

124.111 Continued 8(a) program eligibility.

124.112 Concerns owned by Indian tribes, including Alaska Native Corporations.

124.113 Concerns owned by Native Hawaiian Organizations.

124.114 Concerns owned by Community Development Corporations.

124.201 8(a) Program application.

124.202 Place of filing.

124.203 Servicing office.

124.204 Applicant representatives.

124.205 Forms and documents required.

124.206 Approval and decline of applications for 8(a) program admission.

124.207 8(a) Program exit.

124.208 Program graduation.

124.209 Program termination.

124.210 Appeals to SBA's Office of Hearings and Appeals.

124.211 Suspension of program assistance.

124.300 Business development.

124.301 Development of business plan.

124.302 Review and modification of business plan.

124.303 Stages of 8(a) program participation.

124.304—124.305 [Reserved]

124.306 Financial assistance for skills training.

124.307 Contractual assistance.

124.308 Procedures for obtaining and accepting procurements for the 8(a) program.

124.309 Barriers to acceptance.

124.310 Approval of lower tier subcontractors.

124.311 8(a) competition.

124.312 Competitive business mix.

124.313 Certification of SBA's competency.

124.314 Performance of work by the 8(a) concern.

124.315 Fair market price for 8(a) awards.

124.316 Contract administration.

124.317 Performance of contracts by original 8(a) concern.

124.318 Exercise of options and modifications.

124.319 Contract termination.

124.320 Disputes and appeals.

124.321 Joint venture agreements.

124.401 Advance payments.

124.402 Business development expense.

124.403 Development Assistance Program.

124.404 Small Business and Capital Ownership Development Program.

124.501 Miscellaneous reporting requirements.

Subpart B—Disadvantaged Business Status Protest and Appeal Procedures

124.601 Introduction.

124.602 General definitions.

124.603 Who may protest the disadvantaged status of a concern.

124.604 Who makes disadvantaged status determinations.

124.605 Protest procedures.

§ 124.1

13 CFR Ch. I (1–1–98 Edition)

- 124.606 Grounds of protest.
- 124.607 Form and specificity of protest.
- 124.608 Notification of protest.
- 124.609 Making the disadvantaged status determination.
- 124.610 Appeals of disadvantaged status determinations.

AUTHORITY: 15 U.S.C. 634(b)(6), 636(j), 637(a), and 637(d), Pub. L. 99-661, sec. 1207, Pub. L. 100-656, Pub. L. 101-37, Pub. L. 101-574, and 42 U.S.C. 9815.

Subpart A—Minority Small Business and Capital Ownership Development

SOURCE: 54 FR 34712, Aug. 21, 1989, unless otherwise noted.

§ 124.1 Scope of regulations.

(a) *General.* (1) These regulations implement sections 8(a) and 7(j) of the Small Business Act, as amended by the Business Opportunity Development Reform Act of 1988, and Business Opportunity Development Reform Act Technical Corrections Act, (15 U.S.C. 637(a) and 636(j), as amended by Pub. L. 100-656 and Pub. L. 101-37.). Sections 8(a) and 7(j) of the Small Business Act establish the Minority Small Business and Capital Ownership Development Program or 8(a) Program. The 8(a) Program is intended to be used exclusively for business development purposes to help small businesses owned and controlled by socially and economically disadvantaged individuals, economically disadvantaged Indian tribes, including Alaska Native Corporations, and economically Native Hawaiian Organizations to compete on an equal basis in the mainstream of the American economy.

(2)(i) Except as set forth in paragraphs (a)(2)(ii) and (iii) of this section and § 124.311(b) of this title, these regulations apply to all business concerns that are 8(a) Program Participants, or have 8(a) Program applications in process as of the effective date of the regulations. As noted, portions of these regulations also apply to other Federal programs for which social and economic disadvantaged status is a requirement of program eligibility. Such programs include, among others, the Small Disadvantaged Business (SDB) Set-aside and Bid Preference Programs

authorized by section 1207(a) of Pub. L. 99-661, and the Minority Small Business Subcontracting Program authorized by section 8(d) of the Small Business Act (15 U.S.C. 637(d)).

(ii) Applications in process as of the effective date of these regulations, including applications that have been declined but have not received final determinations on requests for reconsideration, will not be subject to the new provisions of § 124.107(a) regarding length of time in business or the new provisions of § 124.109(b) which make franchises ineligible for 8(a) program participation. Such applicants will be subject to Agency policy requirements regarding potential for success and ineligible businesses which were in effect on the date of application.

(iii) Procedures described in § 124.210 relating to appeal of SBA's decline of an application are effective as to applications which are declined, after reconsideration, by the Associate Administrator for Minority Small Business and Capital Ownership Development on or after the effective date of these regulations. Procedures described in §§ 124.208, 124.209, 124.211, relating to Program graduation, Program termination and Program suspension shall apply to concerns which SBA seeks to graduate, terminate or suspend but to which, as of the effective date of these regulations, an Order to Show Cause has not been issued pursuant to 13 CFR 124.110(k), 124.112 and 124.113 of SBA's rules which were in effect on July 31, 1989. Proceedings relating to any concern to which SBA has issued an Order to Show Cause prior to the effective date of these regulations shall be governed by 13 CFR part 124 and part 134 as it existed on the date of the issuance of the Order to Show Cause.

(b) *The 8(a) and 7(j) programs.* (1) Section 8(a) authorizes SBA to enter into all types of contracts, including, but not limited to, contracts for supplies, services, construction, research and development with other Government departments and agencies and to subcontract the performance of these contracts to small business concerns owned and controlled by socially and economically disadvantaged individuals, Indian tribes or Hawaiian Native Organizations.

Small Business Administration

§ 124.6

(2) Section 7(j) authorizes SBA to provide financial assistance to public or private organizations to pay all or part of the cost of projects designed to provide technical or management assistance to individuals or small business concerns eligible for assistance under sections 7(i), 7(j)(10), and 8(a) of the Small Business Act.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34902, Aug. 27, 1990]

§ 124.2 Associate Administrator for Minority Small Business and Capital Ownership Development.

The Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD), who shall be an employee in the competitive service or in the Senior Executive Service, and a career appointee, is responsible for the formulation and execution of the policies and programs under sections 7(j) and 8(a) of the Small Business Act. The AA/MSB&COD operates under the ultimate supervision of, and is generally responsible to, the Administrator of SBA.

§ 124.3 Division of Program Certification and Eligibility.

The Division of Program Certification and Eligibility (Division) within the Office of Minority Small Business and Capital Ownership Development (MSB&COD) shall be responsible for handling all matters relating to 8(a) program eligibility, termination and graduation from 8(a) program participation, and certifications of disadvantaged status for purposes of any program or activity conducted under the authority of section 8(d) of the Small Business Act or any Federal law that references such section. The Division, headed by a Director who shall report directly to the AA/MSB&COD, shall have field offices within some or all of the Agency's regional offices.

§ 124.4 Commission on Minority Business Development.

A Commission on Minority Business Development (Commission) shall be established pursuant to section 505 of the Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656). This Commission is authorized to review all Federal programs designed to promote

the development of minority-owned businesses in order to ascertain whether the congressionally described goals and purposes of such programs are being realized.

§ 124.5 Violations.

Willful violation by an applicant for admission to the section 8(a) program or an applicant for participation in the section 7(j) program or any of SBA's regulations governing these or its other programs may result in the applicant's denial of admission to the program. The nature and severity of any such violation will be considered by the AA/MSB&COD in making a determination on the admission of an applicant to the program.

§ 124.6 Penalties for misrepresentations and false statements.

(a) *General.* Section 16 of the Small Business Act (15 U.S.C. 645) sets forth penalties for false statements and misrepresentations.

(b) *Misrepresentation of small business or small disadvantaged business status.* The Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656) increased the penalties for intentional misrepresentation of small business status or small disadvantaged business status. Generally, section 16(d) of the Small Business Act provides that any person or entity that intentionally misrepresents the status of any concern or person as a "small business concern" or "small business concern owned and controlled by socially and economically disadvantaged individuals" in order to obtain for him/herself or another any of the contracting opportunities set forth in paragraph (b)(1) of this section will be subject to the penalties set forth in paragraph (b)(2) of this section. The following contracting opportunities are subject to penalties for misrepresentation described in this section:

(1)(i) A prime contract to be awarded pursuant to section 9 (Small Business Innovation Research Program authority) or section 15 (various small business set-aside authorities) of the Small Business Act;

(ii) A subcontract to be awarded pursuant to section 8(a) of the Small Business Act;

§ 124.7

13 CFR Ch. I (1–1–98 Edition)

(iii) A subcontract that is to be included as part or all of a goal contained in a subcontracting plan required pursuant to section 8(d) of the Small Business Act; or

(iv) A prime or subcontract to be awarded as a result, or in furtherance, of any other provision of Federal law that specifically references section 8(d) of the Small Business Act for a definition of program eligibility.

(2) The following penalties apply for violations of this section:

(i) A fine of not more than \$500,000 or by imprisonment for not more than 10 years, or both;

(ii) The administrative remedies prescribed by the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801–3812) and implementing regulations in part 142 of this chapter;

(iii) Suspension and debarment as specified in 13 CFR part 145 of subpart 9.4 of the Federal Acquisition Regulation (FAR) (48 CFR subpart 9.4), or any successor regulation, on the basis that such misrepresentation indicates a lack of business integrity that seriously and directly affects the present responsibility of a person or entity to transact business with the Federal government; and

(iv) Ineligibility for participation in any program or activity conducted under the authority of the Small Business Act or the Small Business Investment Act of 1958 (15 U.S.C. 661, *et seq.*) for a period not to exceed 3 years.

(c) *Misrepresentation concerning compliance with competitive mix targets.* Section 16(f) of the Small Business Act, as amended by Public Law 100–656, imposes the penalties set forth in paragraph (b)(2) of this section on any person or entity that falsely certifies past compliance with the requirements of section 7(j)(10)(I) of the Small Business Act which deals with competitive business mix and attainment of business activity targets (see § 124.312).

§ 124.7 Restrictions on fees for applicant and Participant representatives.

(a) *General.* The compensation received by any agent or representative of an 8(a) applicant or Program Participant for assisting the applicant in obtaining 8(a) certification or for assist-

ing the Program Participant in obtaining 8(a) contracts must be reasonable in light of the service(s) performed by the agent or representative.

(b) *Contingent fees.* Payment of a contingent fee for assisting a Program Participant in obtaining any 8(a) contract is generally prohibited as contrary to public policy, but is permitted if the payment is made by a Program Participant to a “bona fide employee” or a “bona fide agency,” as defined by the FAR, 48 CFR subpart 3.4, and § 124.100.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34902, Aug. 27, 1990; 60 FR 29974, June 7, 1995]

§ 124.100 Definitions.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination thereof. The term includes, in the absence of proof of a minimum blood quantum, any citizen who is regarded as an Alaska Native by a Native village or Native group and whose father or mother is regarded as an Alaska Native.

Alaska Native Corporation means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*)

Application or *8(a) application* means all forms and attachments required by SBA to be completed by an applicant for the 8(a) program for the purpose of establishing program eligibility.

Bona fide agency means an established commercial or selling agency, maintained by a contractor (or subcontractor where SBA is the contractor) for the purpose of securing business that neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds itself out as being able to obtain any government contract or contracts through improper influence.

Bona fide employee, means a person, who is employed by a contractor (or

subcontractor where SBA is the contractor) and subject to the contractor's, (or where SBA is the contractor, the subcontractor's) supervision; control as to time, place, and manner of performance; and who neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds himself/herself out as being able to obtain any government contract or contracts through improper influence.

Business Opportunity Specialist (BOS) means the SBA field office employee responsible for providing business development assistance to Program Participants pursuant to sections 7(j) and 8(a) of the Small Business Act (15 U.S.C. 636(j) 637(a)).

Business plan means the business plan documents as submitted by the 8(a) concern and approved in writing by SBA which include the objectives, goals, and business projections of an 8(a) concern, and all written amendments or modifications which have also been approved in writing by SBA.

CDC-owned concern means any concern at least 51 percent owned by a Community Development Corporation as defined in this section.

Certification of SBA's competency means a certification by SBA, based on its assessment of an 8(a) concern's competency to perform, that SBA is competent to perform the requirements as stated in the contract. The assessment does not require a special investigation or the issuance of a Certificate of Competency (COC) as provided for elsewhere in these regulations under the authority of section 8(b)(7)(A), (B) and (C) of the Small Business Act.

Community Development Corporation or CDC means a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805 *et seq.*

Concern is defined in part 121 of this title.

Days means calendar days unless otherwise specified.

Descendant of an Alaska Native means a lineal descendant of an Alaska Native, or of an individual who would have been an Alaska Native if such individual were alive on December 18, 1971, or an adoptee of an Alaska Native, or of a descendant of an Alaska Native

whose adoption occurred prior to his or her majority (age 18 in the State of Alaska), and is recognized at law or in equity.

Disadvantaged individual means an individual who SBA has determined to be socially and economically disadvantaged in connection with a concern's application for or participation in the 8(a) program.

Fixed Program Participation Term means that ultimate time period during which a concern may have participated in the 8(a) program under Public Law 96-481, (April 21, 1982).

Graduation means completion of 8(a) Program Participation pursuant to § 124.208 prior to expiration of the Program Term because of substantial achievement of the targets, objectives and goals contained in the Participant's business plan.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-son, step-daughter, step-brother, step-sister, half-brother and half-sister.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation, as defined in this section, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which such tribe, band, nation, group, or community resides. *See*, definition of "tribally-owned concern."

Joint venture agreement means an agreement between an eligible 8(a) concern and another small business concern, whether or not an 8(a) participant, solely for the purpose of performing a specific 8(a) contract. *See* § 124.321(h) for joint venture agreements with tribally-owned 8(a) concerns.

Manufacturer means a concern which owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment described in the business plan. In order to qualify as a manufacturer, a concern must be able

to show that it is an established manufacturer of particular goods or goods of general character which may be sought by the Government, or, if it is newly entering into such manufacturing activity, that it has made all necessary prior arrangements for space, equipment, and personnel to perform manufacturing operations. A new firm which has made such definite commitments in order to enter a manufacturing business which will later qualify it for the 8(a) program, shall not be barred from 8(a) approval because it has not yet done any manufacturing; however, this interpretation is not intended to qualify a firm whose arrangements to use space, equipment, or personnel are contingent upon 8(a) approval. This definition is based upon the Walsh-Healey Public Contracts Act, 41 U.S.C. 35–45.

Native Hawaiian means any individual whose ancestors were natives prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which

- (1) Is a not-for-profit organization chartered by the State of Hawaii,
- (2) Is controlled by Native Hawaiians, and
- (3) Whose business activities will principally benefit such Native Hawaiians.

Negative control is defined in part 121 of this title, 13 CFR 121.401(c) (1) and (2) only.

Nondisadvantaged individual means any individual who does not claim disadvantaged status, does not qualify as disadvantaged, or upon whose disadvantaged status applicant concern does not rely in qualifying for 8(a) program participation. An individual who has used his/her disadvantaged status in previously qualifying a concern for 8(a) program participation is considered a nondisadvantaged individual for all other 8(a) program purposes.

Non-8(a) business activity target means the amount of non-8(a) revenue forecasted in a Participant's approved business plan during each year of its participation in the 8(a) program. During the developmental stage of program participation, these targets are goals of non-8(a) business that a Participant

must strive to achieve and may be either a percentage of total revenues or a specified dollar figure. During the transitional stage of program participation these targets must be expressed as a percentage of total revenues, as set forth in §124.312(c), that a Participant is required to achieve in each year in the transitional stage.

Open requirement means a requirement submitted to SBA by a procuring agency for possible 8(a) award without a particular 8(a) concern being identified as a candidate for the award. Open requirements can be for local buy items or national buy items.

Operational control means actual or constructive authority to establish long and short term goals for the concern, and to manage the concern's day-to-day operations.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. See §124.106.

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary of industry the 8(a) applicant or Participant as defined in part 121 of this title.

Principal place of business means the location at which the business records of the applicant concern are maintained and the location at which the individual who manages the concern's day-to-day operations spends the majority of his/her working hours.

Program Participant (Participant or 8(a) Participant) means a small business concern participating in the Small Business and Capital Ownership Development Program established by sections 7(j) and 8(a) of the Small Business Act (15 U.S.C. 636(j) and 637(a)).

Program suspension means the temporary cessation of all 8(a) program assistance pursuant to §124.211 of these regulations.

Program year means a 12-month period of an 8(a) Participant's Program Participation. The first program year begins on the date that the concern is certified to participate in the 8(a) program and ends one year later. Each subsequent program year begins on the Participant's anniversary of program certification and runs for one 12-month period.

Regular dealer means regular dealer as defined by the Walsh-Healey Public Contracts Act, 41 U.S.C. 35-45, and Department of Labor regulations found at 41 CFR 50-201.101, 50-206.53, and 50-206.54.

Requirement means a contract opportunity from a Federal procuring agency to acquire articles, equipment, supplies, services, materials or construction work.

Same or similar line of business means all business activities within the same two-digit "Major Group" of the Standard Industrial Classification (SIC) System (set forth in the SIC Manual), as the primary industry classification of the applicant concern.

Self-marketing of a requirement occurs when an 8(a) firm identifies a requirement that has not been committed to the 8(a) program and, through its marketing efforts causes the procuring agency to offer that specific requirement to the 8(a) program on its behalf. A firm which identifies and markets a requirement which is subsequently offered to the 8(a) program as an open requirement or on behalf of another 8(a) Participant has not "self-marketed" the requirement within the meaning of these regulations.

Termination means the permanent cessation of 8(a) Program Participation prior to the expiration of the concern's Program Term for good cause pursuant to § 124.209.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

Unconditional ownership means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, shareholder agreements or other similar arrangements which serve to allow the primary benefits of Program Participation to accrue to entities or individuals other than upon whom 8(a) program eligibility is based.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34902, Aug. 27, 1990; 60 FR 29974, June 7, 1995]

§ 124.101 The 8(a) program: General eligibility.

(a) In order to be eligible to participate in the 8(a) program, an applicant concern and an individual upon whom

8(a) eligibility is based must meet all of the eligibility criteria set forth in §§ 124.102 through 124.109 hereunder. An applicant concern owned and controlled by an Indian tribe must meet the requirements set forth in § 124.112 and in §§ 124.102 through 124.109 as applicable. An applicant concern owned and controlled by a Native Hawaiian Organization must meet the requirements set forth in § 124.113 and in §§ 124.102 through 124.109, as applicable. An applicant concern owned and controlled by a Community Development Corporation must meet the requirements set forth in § 124.114 and in §§ 124.102 through 124.109, as applicable. All determinations by the AA/MSB&COD made pursuant to §§ 124.102, 124.103, 124.104, 124.105, 124.106, and 124.107 shall be in writing, setting forth the findings based on relevant facts and in accordance with law and regulations, upon which the determination is based. An applicant concern which is declined 8(a) program admission may request a reconsideration of such decline, as set forth in § 124.206. If the application is declined on reconsideration based solely on a negative finding of social disadvantage, economic disadvantage, ownership or control, such decline may be appealed by an unsuccessful applicant to the Office of Hearings and Appeals. If no reconsideration is sought, or if after reconsideration, the application is declined based in whole or in part on a ground other than a negative finding of social disadvantage, economic disadvantage, ownership or control, the written decline of the AA/MSB&COD is final and not subject to appeal. Appeal procedures for a decline of program admission by the AA/MSB&COD and grounds for which such an appeal may be brought are set forth in § 124.210 and part 134 of this title. The written decision of the Office of Hearings and Appeals shall be the final Agency decision. A concern which has been declined for 8(a) program admission may reapply for program admission 12 months after the date of the final Agency decision to decline.

(b) In order to continue its participation in the 8(a) program, a Program Participant must continue to meet all eligibility requirements described in §§ 124.102 through 124.109, § 124.111(a),

and § 124.112, § 124.113 or § 124.114, if applicable. In order to continue its participation in the 8(a) program, a concern certified for program participation prior to the effective date of these regulations must comply with the requirements of §§ 124.102 through 124.109, 124.11(a) and 124.112, if applicable, which have been previously required by regulation, policy or procedure. Within 12 months of the effective date of these regulations, such concerns must also come into compliance with the requirements of paragraph (a) of this section which have not been previously required by regulation, policy or procedure. Failure to do so may lead to termination or graduation pursuant to §§ 124.208 and 124.209.

(c)(1) It is SBA's intent to process applications for participation in a fair and consistent manner and to ensure that 8(a) program participation is limited to eligible individuals and concerns. Toward that end, SBA invites the participation of the public in preventing fraud and assuring the integrity of the 8(a) program.

(2) The AA/MSB&COD shall cause to be reviewed any determination that an individual, applicant concern or Participant is eligible to participate in the 8(a) program whenever a member of the public submits credible evidence that

(i) Such determination was based on fraudulent information;

(ii) SBA did not follow the requirements of these regulations in rendering the determination; or

(iii) The individual or concern has undergone one or more changes which have rendered it ineligible for 8(a) Program Participation.

(3) The AA/MSB&COD shall determine whether the facts developed during any such review warrant further action. The member of the public whose information gave rise to the review shall be advised of SBA's findings, consistent with laws protecting confidentiality.

[54 FR 34712, Aug. 21, 1989, as amended at 60 FR 29974, June 7, 1995]

§ 124.102 Small business concern.

(a) In order to be approved for participation in the 8(a) program, an applicant concern must qualify as a small business concern as defined in part 121

of this title. The particular size standard to be applied will be based on the primary industry classification of the applicant concern. The size of a tribally-owned concern, a concern owned by a Native Hawaiian Organization, or a concern owned by a Community Development Corporation shall be additionally determined by reference to § 124.122, § 124.113 or § 124.114, respectively.

(b) If the AA/MSB&COD is unable to determine that an applicant concern qualifies as a small business, the AA/MSB&COD may deny the concern's application for 8(a) program admission or may request a formal size determination from the appropriate regional office. If the application is so denied, the small business concern may request a formal size determination from the appropriate regional office pursuant to part 121 of this title. Size determinations by an SBA regional office may be appealed to SBA's Office of Hearings and Appeals pursuant to part 121 of this title.

(c) In order to continue to participate in the 8(a) program, a Program Participant must qualify pursuant to the provisions of part 121 of this title as a small business under one or more of the SIC Codes contained in the concern's approved business plan.

(d) Except for contracts awarded to joint ventures controlled by eligible Indian tribes, under § 124.321, a Program Participant must certify that it is a small business pursuant to part 121 of this title for the purpose of performing each contract awarded under the authority of section 8(a). SBA, in turn, will undertake to verify such certifications. In the event that the SBA does not verify a certification, the Program Participant may request a formal size determination from the appropriate SBA regional office. Formal size determinations will be conducted in accordance with part 121 of this title.

[54 FR 34712, Aug. 21, 1989, as amended at 60 FR 29974, June 7, 1995]

§ 124.103 Ownership requirements.

Except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations, as

defined in §124.110, in order to be eligible to participate in the 8(a) program, an applicant concern must be at least 51 percent unconditionally owned by an individual(s) who is a citizen of the United States (specifically excluding permanent resident alien(s)) and who is determined by SBA to be socially and economically disadvantaged. Special ownership requirements for concerns owned by Indian tribes and Alaska Native Corporations are set forth in §124.112. Ownership requirements for Native Hawaiian Organizations are set forth in §124.113. Ownership requirements for Community Development Corporations are set forth in §124.114.

(a) In the case of an applicant concern which is a partnership, 51 percent of the partnership interest must be unconditionally owned by an individual(s) determined by SBA to be socially and economically disadvantaged. Such unconditional ownership must be reflected in the concern's partnership agreement.

(b) In the case of an applicant concern which is a corporation, 51 percent of each class of voting stock and 51 percent of the aggregate of all outstanding shares of stock must be unconditionally owned by an individual(s) determined by SBA to be socially and economically disadvantaged.

(c) SBA will not find unconditional ownership if socially and economically disadvantaged individual(s) asserts ownership of a concern on the basis of unexercised stock options or other arrangements.

(d) When determining ownership for purposes of 8(a) program eligibility, SBA will consider options to purchase stock held by nondisadvantaged individuals or entities, or to rights to convert non-voting stock or debentures held by nondisadvantaged individuals or entities into voting stock, to have been exercised. However, any potential ownership interests (such as options or warrants) held by investment companies licensed under the Small Business Investment Act of 1958 shall not be treated as ownership interests until exercised.

(e)(1) The individual(s) upon whom eligibility is based must receive at least 51 percent of the annual distribu-

tion of dividends paid on the voting stock of a corporate applicant concern;

(2) In the event that the stock is sold, the individual(s) upon whom eligibility is based must be entitled to receive 100 percent of the value of each share of stock in his/her possession; and

(3) In the event of dissolution of the corporation, the individual(s) upon whom eligibility is based must be entitled to receive at least 51 percent of the retained earnings of the concern and 100 percent of the value of each share of stock in his/her possession.

(f) One 8(a) concern may not hold more than a 10 percent equity ownership interest in any other 8(a) concern.

(g) Except for partners or shareholders which are financial institutions licensed or chartered by Federal, state or local government, including investment companies which are licensed under the Small Business Investment Act of 1958, an individual, whether or not disadvantaged, or entity, who/which is a partner, stockholder, officer and/or director in an 8(a) concern is prohibited from simultaneously holding an equity ownership interest exceeding 10 percent in another 8(a) concern. In no case shall an ownership interest in an 8(a) concern held by any such financial institution exceed 49 percent. The restrictions of this paragraph are not intended to affect the ability of an 8(a) concern to participate in any joint venture agreement that meets the requirements of §124.321.

(h) A non-8(a) concern in the same or similar line of business is prohibited from having an equity ownership interest in an 8(a) concern which exceeds 10 percent, except that a former Program Participant (except those that have been terminated from 8(a) program participation pursuant to §124.209) may have an equity ownership interest of up to 20 percent in a current 8(a) concern in the same or similar line of business. The restrictions of this paragraph are not intended to affect the ability of an 8(a) concern to participate in any joint venture agreement that meets the requirements of §124.321.

(i) An 8(a) business concern may continue participation in the program subsequent to a change in its 8(a) ownership, provided that SBA gave prior written approval to such change.

Where the change in 8(a) ownership represents less than a 10 percent interest in the concern or results from the death or incapacity due to serious, long-term illness or injury of a disadvantaged principal, prior approval is not required; however, the concern shall notify SBA as soon as possible. Continued participation of the 8(a) concern under new disadvantaged ownership requires SBA's determination that all individual and business eligibility requirements of these regulations are met by the concern and the new owners.

(j) A Program Participant's request for SBA's approval for the issuance of a public offering will be treated as a request for a change of ownership. Such request will cause SBA to examine the concern's continued need for access to the business development resources of the 8(a) program.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 33896, Aug. 20, 1990; 60 FR 29975, June 7, 1995]

§ 124.104 Control and management.

Except for concerns owned by Indian tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations, or Community Development Corporations (CDCs), as defined in § 124.100, an applicant concern's management and daily business operations must be conducted by one or more owners of the applicant concern who have been determined to be socially and economically disadvantaged. (See § 124.112 for the requirements for tribally-owned entities and those owned by ANCs, § 124.113 for requirements for concerns owned by Native Hawaiian Organizations, and § 124.114 for requirements for CDC-owned concerns). In order for a disadvantaged individual to be found to control the concern, that individual must have managerial or technical experience and competency directly related to the primary industry in which the applicant concern is seeking certification.

(a)(1) An applicant concern must be managed on a full-time basis by one or more individuals who have been found by SBA to be socially and economically disadvantaged, and such person(s) must possess requisite management or technical capabilities as determined by

SBA. In addition, for those industries requiring professional licensing (i.e., public accountancy, law, professional engineering, etc.), SBA must determine that the applicant concern or individuals employed by the applicant concern hold(s) the requisite license(s).

(2) At least one socially and economically disadvantaged full-time manager must hold the position of President or Chief Executive Officer. This precludes outside employment or any other business interest by the individual which conflicts with the management of the firm or hinders it in achieving the objectives of its business development plan. Any disadvantaged person upon whom 8(a) eligibility is based, who is engaged in the management and daily business operations of the 8(a) concern and who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the written approval of SBA, prior to engaging in such employment. SBA will review such notification for compliance with the requirement of day-to-day management and control of the 8(a) concern.

(b) The socially and economically disadvantaged individual(s) upon whom eligibility is based shall control the Board of Directors of an applicant or 8(a) concern, either in actual numbers of voting directors or through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is disadvantaged and one is not, the disadvantaged vote must be weighted—worth more than one vote—in order for the concern to be eligible for 8(a) participation.) This does not preclude the appointment of non-voting or honorary Directors so as to allow the firm to have a varied and experienced Board of Directors. All arrangements regarding the structure and voting rights of the Board must comply with applicable state law.

(c) Individuals who are not socially and economically disadvantaged may be involved in the management of an applicant concern, and may be stockholders, partners, officers, and/or directors of such concern. Such individual(s), their spouses or immediate family members who reside in the individual's household may not however:

(1) Exercise actual control or have the power to control the applicant or 8(a) concern.

(2) Be an officer or director or more than a 10% owner, stockholder, or partner of another firm in the same or similar line of business as the applicant or 8(a) concern.

(3) Receive excessive compensation from the applicant or 8(a) concern as directors, officers or employees. Individual compensation from the concern in any form, including dividends, which is paid to a nondisadvantaged owner, his/her spouse or immediate family member residing in the same household will be deemed excessive if it exceeds the compensation to be received by the Chief Executive Officer or, if no Chief Executive Officer, the President; provided that, with the written consent of the AA/MSB&COD or designee, the Chief Executive Officer or President may elect to take a lower salary than such a nondisadvantaged individual if it is demonstrated to be in the best interest of the applicant or 8(a) concern.

(4) Be former employers of the disadvantaged owner(s) of the applicant or 8(a) concern, unless it is determined by the AA/MSB&COD that the contemplated relationship between the former employer and the disadvantaged individual or applicant concern does not give the former actual control or the potential to control the applicant or 8(a) concern and such relationship is in the best interests of the 8(a) firm.

(5) Have an equity ownership interest of more than 10 percent in another 8(a) concern.

(d) Nondisadvantaged individuals or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

(1) Nondisadvantaged individuals control the voting Board of Directors of the 8(a) concern, either directly through majority voting membership, or indirectly, if the by-laws allow nondisadvantaged individuals to block any action proposed by the disadvantaged individuals through negative control. For example, an equal number of disadvantaged and nondisadvantaged voting directors could create negative control.

(2) A nondisadvantaged individual, as an officer or member of the Board of Directors of the 8(a) concern, or through stock ownership, has the power to control day-to-day direction of the business affairs of the concern.

(3) The nondisadvantaged individual or entity provides critical financial or bonding support or licenses to the 8(a) concern which directly or indirectly allows the nondisadvantaged individual to gain control or direction of the 8(a) concern.

(4) A nondisadvantaged individual or entity exercises voting control of the Participant through a nominee(s).

(5) A nondisadvantaged individual or entity controls the corporation or the individual disadvantaged owners through loan arrangements.

(6) Other contractual relationships exist with nondisadvantaged individuals or entities, the terms of which would create control over the disadvantaged concern.

[54 FR 34712, Aug. 21, 1989, as amended at 60 FR 29975, June 7, 1995]

§ 124.105 Social disadvantage.

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, see § 124.112(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or

Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section.

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if SBA has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the abovenamed groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(i) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

(ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(iii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(iv) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

(v) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. SBA will entertain any relevant evidence in assessing this element of an applicant's case. SBA will particularly consider and place emphasis on the following experiences of the individual, where relevant:

(A) *Education.* SBA shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(B) *Employment.* SBA shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

(C) *Business history.* SBA shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

(d) *Socially disadvantaged group inclusion—(1) General.* Upon an adequate preliminary showing to SBA by representatives of an identifiable group that the group has suffered chronic racial or ethnic prejudice or cultural bias, and upon the request of the representatives of the group that SBA do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a group not specifically named in paragraph (b)(1) of this section to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the 8(a) program. The notice shall adequately identify the group making the request, and if a hearing is requested on the matter and such request is granted, the time, date and location at which such hearing is to be held. All

information submitted to support a request should be addressed to the AA/MSB&COD.

(2) *Standards to be applied.* In determining whether a group has made an adequate preliminary showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine:

(i) Whether the group has suffered the effects of prejudice, bias, or discriminatory practices;

(ii) Whether such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Whether such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners. If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will publish the notice described in paragraph (d)(1) of this section.

(3) *Procedure.* Once a notice is published under paragraph (d)(1) of this section, SBA shall adduce further information on the record of the proceeding which tends to support or refute the group's request. Such information may be submitted by any member of the public, including Government representatives and any member of the private sector. Information may be submitted in written form, or orally at such hearings as SBA may hold on the matter.

(4) *Decision.* Once SBA has published a notice under paragraph (d)(1) of this section, it shall afford a period of not more than thirty (30) days for public comment concerning the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings within such comment period. Thereafter, SBA shall consider all information received and shall render its final decision within 60 days of the close of the comment period. Such decisions shall be published as a notice in the FEDERAL REGISTER. Concurrent with the notice, SBA shall advise the petitioners of its final decision in writing. If appropriate, SBA shall amend this regulation accordingly.

§ 124.106 Economic disadvantage.

(a) *Economic disadvantage for the 8(a) program.* (1)(i) For purposes of the 8(a) program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for purposes of 8(a) program eligibility, SBA shall compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.

(ii) This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources.

(iii) For economic disadvantage as it relates to tribally-owned concerns, see § 124.112(b)(2).

(2) *Factors to be considered.* In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, SBA will consider factors relating both to the applicant concern and to the individual(s) claiming disadvantaged status. Factors fall into three general categories: The personal financial condition of the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets.

(i) *Personal financial condition of the individuals claiming disadvantaged status.* This criterion is designed to assess the relative degree of economic disadvantage of the individual, as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to

be considered include, but are not limited to: the individual's personal income for at least the past two years; total fair market value of all assets; and the individual's personal net worth. Subject to the exclusions set forth in paragraph (a)(2)(i)(B) of this section, an individual whose personal net worth exceeds \$250,000 will not be considered economically disadvantaged for purposes of 8(a) program entry. For personal net worth thresholds relating to continued 8(a) program eligibility, see § 124.111(a).

(A)(1) Except as provided in paragraph (a)(2)(i)(A)(2) of this section, when married, an individual upon whom eligibility is based shall submit a financial statement relating to his/her personal finances and a separate financial statement relating to his/her spouse's personal finances. A married applicant individual residing in any of the community property states or territories of the United States (e.g., Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin) must clearly identify on his or her financial statement those assets which are his or her separate property and those which are community property. The spouse of such married applicant must similarly identify on his or her financial statement those assets which are his or her separate property and those which are community property. A one-half interest in the assets identified as community property (and income derived from such assets) will be attributed to the applicant individual for purposes of determining economic disadvantage. Assets or a community property interest in assets, which applicant spouse has transferred to a non-applicant spouse within 2 years of the date of application to the 8(a) program will be presumed to be the property of the applicant spouse for purposes of determining his/her personal net worth. However, such presumption shall not apply to any applicant spouse who is subject to a legal separation recognized by a court of competent jurisdiction. A financial statement of a spouse of an applicant is not required if the individual and his/her spouse are subject to a legal separation recognized by a court of competent jurisdiction. However, an

applicant individual must include on his or her statement all community property in which he or she has an interest.

(2) Except for concerns where both spouses are individuals upon whom eligibility is based, the requirement of paragraph (a)(2)(i)(A)(1) of this section, relating to the separate financial statements, applies only to determinations of economic disadvantage for purposes of 8(a) program entry. For a concern where both spouses are individuals upon whom program eligibility is based, the personal net worth of each spouse individually will be considered for program certification and for continued program eligibility.

(B) Whenever SBA calculates the personal net worth of an individual claiming disadvantaged status for purposes of the 8(a) program, SBA shall exclude the individual's ownership interest in the applicant or participating 8(a) concern and the equity in his/her primary personal residence, but shall not exclude any portion of such equity in his/her primary residence which is attributable to excessive withdrawals from the applicant or participating 8(a) concern.

(C) Whenever SBA calculates the personal net worth of an individual claiming to be an Alaska Native, as defined in § 124.100, for purposes of qualifying an individually owned 8(a) applicant concern, SBA shall include assets and income from sources other than an Alaska Native Corporation, as defined in § 124.100, and shall exclude from such calculation any of the following which the individual receives from any Alaska Native Corporation:

(1) Cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum;

(2) Stock (including stock issued or distributed by a Native Corporation as a dividend or distribution on stock);

(3) A partnership interest;

(4) Land or an interest in land (including land or an interest in land received from a Native Corporation as a dividend or distribution on stock); and

(5) An interest in a settlement trust.

(ii) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals. In evaluating a concern's financial condition, SBA's consideration will include, but not be limited to, the following factors: business assets, revenues, pre-tax profit, working capital and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status.

(iii) *Access to credit and capital.* This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. In making the evaluation, SBA shall consider the concern's access to credit and capital, including, but not limited to, the following factors: Access to long-term financing; access to working capital financing; equipment trade credit; access to raw materials and/or supplier trade credit; and bonding capability.

(b) *Economic disadvantage for the 8(d) Subcontracting Program, Small Disadvantaged Business Set-Asides, Small Disadvantaged Business Evaluation Preferences and for any other Federal procurement programs requiring SBA's determination of disadvantaged status.* (1) For purposes of the section 8(d) Subcontracting Program and other programs requiring SBA's determination of disadvantaged status, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and whose diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for the section 8(d) Subcontracting program, Small Disadvantaged Business set-asides and Small Disadvantaged Business Evaluation preferences, SBA will consider the factors set forth in paragraph (a) of

this section but will apply standards to each factor that are less restrictive than those applied when determining economic disadvantage for purposes of the 8(a) program. This approach corresponds to the Congressional intent that partial or complete achievement of a concern's 8(a) program business development goals should not necessarily preclude its participation in other Federal procurement programs for concerns owned and controlled by socially and economically disadvantaged individuals.

(2) An individual whose personal net worth exceeds \$750,000 as calculated pursuant to paragraph (a)(2)(i) of this section, will not be considered economically disadvantaged for purposes of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or any Federal procurement program which uses section 8(d) for its definition of economic disadvantage.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34902, Aug. 27, 1990]

§ 124.107 Potential for success.

Except for tribally-owned applicant concerns which must meet the requirements of § 124.112(c)(6), SBA will approve a concern for Program Participation only when it finds that the applicant concern possesses reasonable prospects for success in competing in the private sector and has been in business in its primary industry classification for two full years, unless a waiver for the two-year in business requirement is granted pursuant to paragraph (b) of this section.

(a) Unless a waiver is granted pursuant to paragraph (b) of this section, an applicant concern must demonstrate that it has been in business in the primary industry classification in which it seeks 8(a) certification for two full years prior to the date of its 8(a) application by submitting income tax returns showing revenues for each of the two previous years.

(b) The requirement that an applicant concern be in business for two full years may be waived, and the concern shall be considered to have demonstrated reasonable prospects for success, if each of the five conditions set forth in paragraph (b)(1) of this section are met.

(1) The two-year in business requirement may be waived if—

(i) The individual or individuals upon whom eligibility is to be based have substantial and demonstrated business management experience;

(ii) The prospective Program Participant has demonstrated technical experience to carry out its business plan with a substantial likelihood for success;

(iii) The prospective Program Participant has adequate capital to sustain its operations and carry out its business plan;

(iv) The prospective Program Participant has a record of successful performance on contracts from governmental and/or nongovernmental sources in the primary industry category in which the prospective Program Participant is seeking Program certification; and

(v) The prospective Program Participant has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and any other requirements needed to perform such contracts.

(2) In order to be eligible for a waiver of the two-year in business requirement, an applicant concern that has been in business for less than two years must indicate in its application that it seeks a waiver, must provide information on governmental and nongovernmental contracts in progress and completed (including letters of reference) to establish successful contract performance, and must demonstrate how it otherwise meets the five conditions for waiver.

(3) SBA shall consider an applicant's performance on both government and private sector contracts if the applicant has performed contracts in both arenas. In such a case, an applicant's performance on both types of contracts will be reviewed to determine whether the firm has an overall successful performance record. If, however, the applicant has performed only government contracts or only private sector contracts, the applicant's performance on those contracts alone will be reviewed to determine whether the applicant possesses a record of successful performance.

(c) In determining whether a concern has the potential for success, SBA will look at a number of factors including, but not limited to, the technical and managerial experience and competency of the individual(s) upon whom eligibility is based, the financial capacity of the applicant concern and the concern's record of performance on previous Federal and private sector contracts in the primary industry in which the concern is seeking 8(a) certification. SBA will examine each of these factors to determine whether the otherwise eligible applicant concern has the potential to successfully perform subcontracts awarded under the 8(a) program and to meet the business development objectives and goals of the program.

(d) An applicant concern shall not be denied admission into the program due solely to a determination that specific contract opportunities are unavailable to assist in the development of the concern unless:

(1) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(2) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other Program Participants providing the same or similar items or services.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 33896, Aug. 20, 1990; 59 FR 12814, Mar. 18, 1994]

§ 124.108 Additional 8(a) program eligibility requirements.

(a) *Individual character review.* If, during the processing of an application, adverse information is obtained from the 8(a) program applicant or a credible source regarding possible criminal conduct by an applicant concern or any of its principals, no further action will be taken on the application until SBA's Inspector General has evaluated that information and has advised the AA/MSB&COD of his or her findings. The AA/MSB&COD will consider those findings when evaluating the application.

(b) *Standards of conduct.* The SBA Standards of Conduct regulations, 13

CFR part 105, *et seq.*, apply to eligibility questions involving SBA employees and their relatives. In particular, see §§ 105.404 and 105.506 of this title prohibiting certain SBA employees and former employees from, among other things, holding an ownership interest in an 8(a) concern.

(c) *Eligibility limitations.* (1) Except for concerns owned by Indian tribes or Alaska Native Corporations, once a concern or disadvantaged individual upon whom eligibility was based has participated in the 8(a) program and the concern has exited the program by termination, graduation, voluntary withdrawal or expiration of its program term, neither the concern nor any individual whose personal disadvantaged status was required to qualify the concern for 8(a) Program Participation shall be eligible to re-apply for Program Participation. See § 124.112 regarding eligibility limitations for Indian tribes, including Alaska Native Corporations.

(2) An individual will be found to have used his or her eligibility for the 8(a) Program if he or she has claimed disadvantaged status by completing the appropriate SBA forms and SBA has approved the applicant concern's entry into the 8(a) program.

(3) Use of eligibility will take effect on the date of the concern's approval into the program.

(4) After an 8(a) concern exits the program, a disadvantaged owner of that concern may hold an ownership interest in or be involved in the management of another 8(a) concern, subject to the provisions of § 124.104(c). In these instances, for purposes of 8(a) participation only, such an individual will be deemed to be a non-disadvantaged owner of that concern and criteria restricting non-disadvantaged individual participation shall apply. See §§ 124.103 and 124.104.

(5) Transfer of the ownership and control of an 8(a) Participant to one or more other individuals does not terminate such concern's eligibility for the program provided that SBA determines the transferee(s) to be socially and economically disadvantaged. However, the 8(a) concern's Program Term as described in § 124.110 is in no way affected by such transfer.

(d) *Manufacturers and regular dealers.*

(1) For purposes of program entry, each applicant concern whose primary industry classification is as a manufacturer or supplier of materials, supplies, articles and equipment must be determined to be a manufacturer or regular dealer as defined in the Walsh-Healey Public Contracts Act Regulations found at 48 CFR part 22, subpart 22.6.

(2) Participants in the developmental stage of 8(a) Program Participation may be eligible for two exemptions from the contingent agreement requirements of the Walsh-Healey Public Contracts Act, see, § 124.304(d). However, the availability of such exemptions during the Program Term in no way affects the requirement that an applicant concern comply with the provisions of paragraph (d)(1) of this section for purposes of program entry.

(e) Multiple concerns in same household. Immediate family members living in the same household may not each use their individual disadvantaged status to qualify more than one business concern for 8(a) Program Participation if the concerns are in the same or similar line of business. When the concerns are in separate lines of business, each applicant must establish that the concerns are separately owned, managed and controlled. (For size limitations see part 121 of this title.)

§ 124.109 Ineligible businesses.

(a) *Brokers and packagers.* Brokers and packagers are ineligible to participate in the 8(a) program. These types of businesses do not satisfy the definition of a manufacturer or regular dealer, as stated in § 124.100.

(b) *Franchises.* Except for those admitted to the 8(a) program prior to the effective date of these regulations, franchisees are ineligible to participate in the section 8(a) program.

(c) *Debarred or suspended person or concern.* Pursuant to 48 CFR part 9, subpart 9.4, or 13 CFR part 145, individuals or concerns who are debarred, suspended, voluntarily excluded from Federal programs, including the 8(a) program, or are found to be ineligible for Federal programs, including the 8(a) Program, by any agency of the Federal Government are ineligible for admission into the 8(a) program during the

period of debarment, suspension, voluntary exclusion or status as ineligible. Prior to approval for admission to the 8(a) program, the applicant must certify that both the applicant concern and the disadvantaged individual(s) upon whom eligibility is based are not at that time debarred, suspended, voluntarily excluded or otherwise ineligible.

(d) *Non-profit organizations.* A non-profit organization does not meet the general definition of a concern as set forth in part 121 and §124.100 of these regulations and is, therefore, ineligible for 8(a) program participation. In addition, a business entity owned by a non-profit organization is not eligible for 8(a) program participation because such a concern does not meet the requirement of being owned and controlled by disadvantaged *individuals*. Nothing in this paragraph affects the eligibility of a for-profit concern owned and controlled by an Indian tribe, including an Alaskan Native Corporation, a Native Hawaiian Organization or a Community Development Corporation (see §§124.112, 124.113 and 124.114).

(e) *Concerns owned by other disadvantaged concerns.* A concern which is owned in whole or in part by another business concern and relies on the disadvantaged status of that concern to claim disadvantaged status is ineligible for 8(a) Program Participation and for participation in the Defense Department's Small Disadvantaged Business program (Pub. L. 99-661, section 1207(a)) and the section 8(d) Subcontracting Program, (15 U.S.C. 637(d)). These types of businesses do not meet the individual disadvantaged ownership requirements of the Small Business Act and these regulations as set forth in §124.103.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34902, Aug. 27, 1990; 60 FR 29975, June 7, 1995]

§ 124.110 Program term.

(a) Each concern certified for program participation on or after November 15, 1988, is subject to a Program Term of nine years from the date of such certification. The term will consist of two stages: the developmental stage and the transitional stage, which are described in §124.303. Nothing in

this subsection shall be construed to limit SBA from initiating graduation, termination or suspension actions pursuant to §§124.208, 124.209 and 124.211 or to prohibit a Participant from voluntarily withdrawing from the program.

(b) A concern is subject to a revised Program Term if the following conditions are met:

(1) The concern was a Program Participant as of September 1, 1988 or was approved for 8(a) Program Participation between September 1, 1988 and November 15, 1988; and

(2) The concern did not voluntarily withdraw from the 8(a) program and was not graduated or terminated pursuant to §§124.208 and 124.209 between September 1, 1988 and November 15, 1988.

(c) The revised Program Term shall be the greater of nine years from the date of the Participant's first contract pursuant to section 8(a) or the Participant's Fixed Program Participation Term (FPPT) expiration date, including any extension thereof, plus 18 months.

(d) Once a Program Term has been established or revised in accordance with this section, SBA is statutorily prohibited from extending such term beyond the specified expiration date.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34902, Aug. 27, 1990]

§ 124.111 Continued 8(a) program eligibility.

(a) *Standards.* (1) Except as set forth in paragraph (a)(2) of this section, in order for a concern to remain eligible for 8(a) program participation, it must continue to meet all eligibility criteria contained in §124.101 through §124.109. Failure to do so may cause SBA to initiate a graduation or termination proceeding in accordance with §§124.208 and 124.209.

(2) In order for a Program Participant to maintain continued 8(a) program eligibility, the net worth of an individual claiming to be socially and economically disadvantaged cannot exceed \$750,000, as calculated pursuant to §124.106(a)(2)(i). An individual whose personal net worth exceeds \$750,000, as calculated pursuant to §124.106(a)(2)(i), will not be considered economically disadvantaged.

(b) *Submissions supporting continued eligibility.* As part of an annual review, each Program Participant shall annually submit to the Division of Program Certification and Eligibility and to the servicing field office the following:

(1) A certification that it meets the 8(a) program eligibility requirements as set forth in §§ 124.101 through 124.109 and paragraph (a) of this section;

(2) A personal financial statement for each disadvantaged owner;

(3) A record of all payments, compensation, and distribution (including loans, advances, salaries and dividends) made by the Participant to each of its owners or to any person or entity affiliated with such owners; and

(4) Such other information as SBA may deem necessary. For other required annual submissions, *see* § 124.501.

(c) *Economic disadvantage eligibility reviews.* (1) Upon receipt of specific and credible information alleging that a Program Participant no longer meets the requirements of economic disadvantage for continued program eligibility, SBA shall conduct a review of the concern's eligibility for continued participation in the Program.

(2)(i) If, based on information received from the Participant or elsewhere, SBA has reason to believe that the Participant no longer meets the standards of economic disadvantage as set forth in § 124.106 or paragraph (a) of this section, SBA shall conduct a review to determine whether the Participant and its disadvantaged owners continue to meet such standards.

(ii) Sufficient reasons for SBA to conclude that an 8(a) Participant is no longer economically disadvantaged may include, but are not limited to: demonstrated access of the concern and/or its owners to a substantial new source of capital or loans, an unusually large amount of funds withdrawn from the concern by its owners, or personal net worth of the disadvantaged owner(s) which exceeds the threshold described in paragraph (a) of this section, not including the owner's equity in the 8(a) concern and in his/her primary personal residence.

(3) If SBA determines, pursuant to paragraphs (c)(1) or (c)(2) of this section, that a Program Participant and/or its disadvantaged owner(s) are no

longer economically disadvantaged, SBA shall initiate a graduation or a termination proceeding under §§ 124.208 and 124.209.

(4) If, based on information received from the Participant or elsewhere, SBA has reason to believe that an excessive amount of funds or other assets has been withdrawn from the Participant for the personal benefit of the disadvantaged owner(s) or that of any person or entity affiliated with such owner(s), SBA shall conduct a review to determine whether such withdrawal was detrimental to the achievement of the targets, objectives and goals of the Participant's business plan.

(5) If SBA determines, pursuant to paragraph (c)(4) of this section, that funds or other assets have been withdrawn to the detriment of the achievement of the targets, objectives and goals of the Participant's business plan, SBA shall initiate a termination proceeding under § 124.209 or shall require an appropriate reinvestment of funds or other assets and such other actions as SBA may deem necessary to counteract the detrimental withdrawals as a condition of maintaining program eligibility.

(d) *Eligibility Reviews.* If, on the basis of information submitted pursuant to paragraph (b) of this section or upon information received from any source, SBA has reason to believe the Program Participant no longer meets the eligibility criteria (other than economic disadvantage), SBA shall conduct a review of the Participant's 8(a) program eligibility. If as a result of such review, SBA determines such Participant may no longer be eligible for program participation, SBA shall initiate termination proceedings under § 124.209.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34902, Aug. 27, 1990; 59 FR 12815, Mar. 18, 1994; 60 FR 29975, June 7, 1995]

§ 124.112 Concerns owned by Indian tribes, including Alaska Native Corporations.

(a) *General.* (1) Small business concerns owned by Indian tribes (or wholly owned business entities of such tribes) are eligible for participation in the section 8(a) program, provided that certain conditions are met as described

below. The term “Indian tribe” is defined in § 124.100.

(2) Small business concerns owned and controlled by Indian tribes are generally considered socially and economically disadvantaged for purposes of participation in programs authorized by section 8(d) of the Small Business Act, section 1207(a) of the Defense Authorization Act of 1987 and any other program, except the 8(a) program, which requires social and economic disadvantaged status as a condition of eligibility. If the disadvantaged status of a tribally-owned concern is challenged under subpart B of this part, SBA will evaluate the concern's disadvantaged status using the criteria set forth in this section.

(3) Small business concerns owned and controlled by Alaska Native Corporations (ANCs) are eligible for participation in the 8(a) program, subject to the same conditions as apply to tribally-owned concerns which are described at paragraphs (b) through (e) of this section, with the following exceptions which apply solely to ANC-owned concerns:

(i) Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock. Settlement common stock means stock of an ANC issued pursuant to 43 U.S.C. 1606(g)(1), which is subject to the rights and restrictions listed in 43 U.S.C. 1606(h)(1).

(ii) An ANC that meets the requirements set forth in paragraph (a)(3)(i) of this section shall be deemed economically disadvantaged and need not establish that it is economically disadvantaged pursuant to paragraph (b)(2) of this section. See section 29(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1626(e).

(iii) Even though an ANC can be either for profit or non-profit, a small business concern owned and controlled by ANC must be for profit to be eligible for the 8(a) program. The concern will be deemed owned and controlled by the ANC for purposes of program eligibility so as to satisfy paragraph (c)(3) of this section where the majority of stock or other ownership interest is held by the ANC and holders of its settlement com-

mon stock. Both a majority of the total equity and total voting power must be so held.

(iv) Paragraphs (b)(3) (i) and (ii) of this section are not generally applicable to an ANC, provided its status as an ANC is clearly shown in its articles of incorporation and by-laws. Additionally, paragraph (c)(1) of this section is not applicable to the ANC-owned concern to the extent it requires an express waiver of sovereign immunity or a “sue and be sued” clause.

(v) The Alaska Native Claims Settlement Act provides that a concern minority-owned by an ANC shall be deemed to be both owned and controlled by such ANC. Therefore, an individual responsible for control and management of an ANC-owned 8(a) applicant or Participant need not establish personal social and economic disadvantage.

(b) *Tribal eligibility.* In order to qualify a concern which it owns and controls for participation in the 8(a) program, an Indian tribe itself must meet the conditions set forth in paragraphs (b)(1) and (b)(2) of this section. Once an Indian tribe has so established its disadvantaged status, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) Program Participation, unless specifically required to do so by the AA/MSB&COD or his/her designee. The AA/MSB&COD, or designee, may require proof of tribal eligibility during the Program Participation of any tribally-owned business or at any time during the processing of an 8(a) program application from a tribally-owned concern. However, nothing in this paragraph affects the requirement that each tribally-owned concern seeking to be certified for 8(a) Program Participation comply with the provisions of paragraph (c) of this section.

(1) *Social disadvantage.* An Indian tribe meeting the definition set forth in § 124.100 shall be deemed socially disadvantaged.

(2) *Economic disadvantage.* In order to be eligible to participate in the 8(a) Program the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This shall involve the consideration of available

data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital markets.
- (vi) The tribal assets as disclosed in a current tribal financial statement. The statement should list all assets including those which are encumbered or held in trust, but the status of those encumbered or trust assets should be clearly delineated.
- (vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each, as defined in § 124.100. The list must also specify the members of the tribe who manage or control such enterprises or serve as officers or directors.

(3) *Application process—forms and documents required.* Except as provided in paragraph (a)(3)(iv) of this section, in order to establish tribal eligibility to qualify for the 8(a) program, the Indian tribe must submit the forms and documents required of 8(a) applicants generally as well as the following material:

- (i) A copy of the tribe's governing document(s) such as its constitution or business charter.
- (ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.
- (iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.
- (iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (b)(2) of this section.

(c) *Business eligibility.* In order to be eligible to participate in the 8(a) program, a concern which is owned by an eligible Indian tribe (or wholly owned business entities of such tribe) must

meet the conditions set forth in paragraphs (c)(1) through (c)(6) of this section.

(1) *Legal business entity organized for profit and susceptible to suit.* The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. Except as provided in paragraph (a)(3)(iv) of this section, the concern's articles of incorporation must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) Program Participation, loans, advance payments and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

(2) *Size.* (i) A tribally-owned applicant concern must qualify as a small business concern as defined for purposes of Government procurement in part 121 of this title. The particular size standard to be applied shall be based on the primary industry classification of the applicant concern.

(ii) Except as provided in paragraph (c)(2)(iii) of this section, a tribally-owned Program Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.

(iii) In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) program entry or contract award, each firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(iv) During its Program Term, a tribally-owned Program Participant may,

for up to five 8(a) contracts, be a party to a joint venture which exceeds the applicable size standard, if the joint venture is:

(A) 51 percent or more owned and controlled by the tribally-owned Participant;

(B) Is located on the tribe's reservation or land owned by such tribe;

(C) Performs most of its activities on such reservation or tribally-owned land; and

(D) Employs members of the tribe for at least 50 percent of its total workforce.

(3) *Ownership.* For corporate entities, a tribe must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a tribe must own at least a 51 percent interest. No Indian tribe shall own more than one current or former 8(a) Program Participant having the same primary industry classification. Tribally-owned Program Participants are subject to the provisions of paragraphs (g) and (h) of §124.103 relating to ownership by nondisadvantaged individuals and non-8(a) concerns.

(4) *Control and management.* (i) Except for concerns owned by ANCs, the management and daily business operations of a tribally-owned concern must be controlled by an individual member(s) of an economically disadvantaged tribe, who does not manage and control more than one other tribally-owned 8(a) Program Participant. In addition, such manager(s) must be found to possess the requisite management or technical capabilities as determined by SBA. This paragraph does not preclude management of a tribally-owned concern by committees, teams, or Boards controlled by such individuals.

(ii) Members of the tribal council shall not participate in the daily management or on the board of directors of any tribally-owned 8(a) concern without obtaining prior written approval for such participation from SBA.

(iii) Except as permitted by paragraph (c)(4)(i) of this section, members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the

management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

(5) *Location and economic benefit.* The primary economic benefits from the concern must accrue to the tribe. A concern located on a designated Indian reservation or on tribally-owned land will be presumed to provide an economic benefit, such as employment, to the tribal community. SBA may approve a location not on tribally-owned land, if the applicant concern can demonstrate that similar economic benefits will accrue to the tribal community.

(6) *Potential for success.* (i) SBA will approve a tribally-owned concern, including a concern owned by an Alaska Native Corporation (ANC), for 8(a) Program participation only when it finds that:

(A) Either the applicant concern has been in business in its primary industry classification for two full years or a waiver is granted pursuant to paragraph (c)(6)(ii); and

(B) The concern meets the requirements of paragraph (c)(6)(iii) regarding potential success.

(ii) The AA/MSB&COD will waive the two year in business requirement for a tribally-owned concern if he/she finds that the concern has a marketing and development strategy for meeting the 8(a) program competitive business mix requirements of §124.312 without undue dependence on one or more contracts anticipated to be awarded under 8(a) program authority.

(iii) In determining whether a tribally-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:

(A) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operations of the tribally-owned concern;

(B) The financial capacity of the tribally-owned concern; and

(C) The concern's record of performance on any previous Federal or private sector contract in the primary industry in which the concern is seeking 8(a) certification.

(7) *Other eligibility criteria.* (i) A tribally-owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless:

(A) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(B) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other Program Participants providing the same or similar items or services.

(ii) Applicant must meet the eligibility criteria set forth in §§ 124.108 and 124.109.

(d) *Individual eligibility limitation.* (1) *Concerns owned by Indian tribes except those owned by Alaska Native Corporations.* The Small Business Act, as amended, provides that the 8(a) requirements regarding management and daily business operations are met if a tribally-owned concern is controlled by one or more members of the economically disadvantaged Indian tribe. The statute does not require that such individual be found by SBA to be personally socially and economically disadvantaged. Therefore, SBA does not deem an individual involved in the management or daily business operations of the tribally-owned concern to have used his or her individual eligibility within the meaning of § 124.108(c).

(2) *Concerns owned by Alaska Native Corporations.* The Alaska Native Claims Settlement Act, as amended, provides that a concern which is majority owned by an Alaska Native Corporation shall be deemed to be controlled and managed by minority individuals for purpose of participation in Federal programs. Therefore, SBA will not examine the disadvantaged status of an individual involved in the management of daily business operations of an Alaska Native Corporation-owned concern, and such individual will not be deemed

to have used his or her individual eligibility within the meaning of § 124.108(c).

(e) *Existing Section 8(a) Firms.* Tribally-owned concerns presently in the section 8(a) program must comply with the requirements of this section within 12 months from the effective date of these regulations. Failure to do so may result in the commencement of section 8(a) program termination proceedings.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 33896, Aug. 20, 1990; 59 FR 12815, Mar. 18, 1994]

§ 124.113 Concerns owned by Native Hawaiian Organizations.

Concerns owned by economically disadvantaged Native Hawaiian Organizations as defined in § 124.100 are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in §§ 124.102 through 124.109 and § 124.111(a) of this part.

§ 124.114 Concerns owned by Community Development Corporations.

(a) Concerns owned at least 51% by Community Development Corporations (CDCs), as defined in § 124.100, are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in §§ 124.102 through 124.109 and § 124.111(a) of this part.

(b) A concern that is at least 51% owned by a CDC shall be deemed to be controlled by such CDC and eligible for participation in the 8(a) program, provided it meets all eligibility criteria set forth or referred to in this section and its management and daily business operations are conducted by one or more individuals determined to have managerial or technical experience and competency directly related to the primary industry in which the applicant concern is seeking certification.

(c) A concern owned by a CDC must qualify as a small business concern as defined for purposes of Government procurement in part 121 of this title.

The particular size standard to be applied shall be based on the primary industry classification of the applicant concern. Ownership by the CDC will not, in and of itself, cause affiliation with the CDC or with other CDC-owned entities. However, affiliation with the CDC or other CDC-owned entities may be caused by circumstances other than common CDC ownership.

(d) No CDC shall own more than one current or former 8(a) Program Participant having the same primary industry classification.

(e) SBA does not deem an individual involved in the management or daily business operations of a CDC-owned concern to have used his or her individual eligibility within the meaning of § 124.108(c).

[60 FR 29975, June 7, 1995]

§ 124.201 8(a) Program application.

It is SBA's policy that any concern or any individual on behalf of such business has the right to apply for 8(a) Program Participation whether or not there is an appearance of eligibility. However, concerns which have not been in business for two full years as described § 124.107 will not be approved for 8(a) Program Participation.

§ 124.202 Place of filing.

An application for 8(a) program admission is to be filed in the SBA field office serving the territory in which the principal place of business, as defined in § 124.100, is located. The field office will provide an applicant concern with information regarding the 8(a) program, and with all required application forms. An 8(a) application will be processed by the appropriate SBA regional office of the Division of Program Certification and Eligibility.

§ 124.203 Servicing office.

Once approved, a Program Participant will be serviced in the field office serving the territory in which the concern's principal place of business, as defined in § 124.100, is located.

§ 124.204 Applicant representatives.

Subject to the limitations of § 124.7, an applicant concern may employ at its option outside representatives in

connection with an application for 8(a) Program Participation. If the applicant chooses to employ outside representation such as an attorney, accountant, or others, the requirements of part 103 of this title dealing with the appearance and compensation of persons appearing before SBA are applicable to the conduct of the representative. In addition, representation in proceedings before the Office of Hearings and Appeals shall be limited as provided in § 134.16 of this title.

§ 124.205 Forms and documents required.

Each 8(a) applicant concern must submit the forms and attachments thereto required by SBA when making application for admission to the 8(a) program. Such forms and attachments will include, but are not limited to, financial statements and Federal personal and business tax returns.

§ 124.206 Approval and decline of applications for 8(a) program admission.

(a) *General.* The AA/MSB&COD is authorized to approve or decline applications for admission to the 8(a) program. However, denials of program admission based on his/her finding that the individual(s) claiming social and economic disadvantage are not socially and/or economically disadvantaged and/or that such individual(s) does (do) not own and/or does (do) not control the applicant concern, may be appealed to SBA's Office of Hearings and Appeals (OHA). The Division of Program Certification and Eligibility (the Division) will receive, review and evaluate all 8(a) applications. The Division will advise each program applicant within 15 days after the receipt of an application whether such application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will process an application for 8(a) Program Participation within 90 days of receipt by the Division of a complete application package. Incomplete application packages will not be processed.

(b) *Approval.* If the AA/MSB&COD finds that the applicant concern meets all eligibility criteria, he/she shall

issue an approval letter to the concern. The date of the approval letter shall be the date of program certification for purposes of determining the concern's Program Term pursuant to §124.110. A concern is not approved for participation in the 8(a) program until an approval letter is sent by the AA/MSB&COD to the concern. Up until that event occurs, any new information which could have an adverse affect on the application may be considered by the AA/MSB&COD. An applicant is not entitled to receive program benefits of any kind until a participation agreement is signed and SBA has approved the concern's business plan pursuant §124.301.

(c) *Decline.* If the AA/MSB&COD finds that an applicant concern does not meet all eligibility criteria, he/she will provide written notification of this finding to the applicant in a letter of decline. The letter of decline shall set forth findings based on the facts and in accordance with law and regulations for every material issue relating to each eligibility factor with specific reasons for each finding. The letter of decline shall inform the applicant of its rights to request reconsideration of the AA/MSB&COD's decision and/or to appeal such decision.

(1) *Reconsideration.* Every applicant has the right to request that the AA/MSB&COD reconsider his/her decline decision. Such request must be made in writing to the appropriate regional office of the Division by certified mail, return receipt requested, within 45 days of the date of service of the decline letter. As part of the reconsideration request, the applicant should include any additional information and documentation pertinent to overcoming the reason(s) for the initial decline. If the concern requests reconsideration, the AA/MSB&COD will issue a written determination on the reconsideration within 45 days of receipt of the request by the Regional Office of the Division which processed the original application. The Agency's eligibility analysis on reconsideration will consider all eligibility factors in light of all information then available to the Agency, and may approve the application, decline it for any of the same reasons cited in the initial decline or de-

cline it for reasons not previously identified. If, on reconsideration, the AA/MSB&COD finds that the applicant concern meets all eligibility criteria, he/she shall issue an approval letter to the concern. The date of the approval letter shall be the date of program certification for purposes of determining the concern's Program Term pursuant to §124.110. If, on reconsideration, the AA/MSB&COD determines that the concern does not meet all eligibility criteria, he/she will notify the applicant of this decision by letter. Such letter shall set forth findings based on the facts and in accordance with law and regulations for every material issue relating to each eligibility factor with specific reasons for each finding. If the concern is being declined solely for reasons not identified in the initial decline, the concern will be advised that SBA will treat the decline as an initial decline, and that the concern will be afforded all rights which were available to it on its initial decline.

(2) *Appeal.* An unsuccessful applicant will have the right to appeal its decline to OHA if the application is denied based solely on a negative finding of one or more of the following criteria: social disadvantage, economic disadvantage, ownership or control. The applicant, at its option, may bring such appeal either after the initial decline or after a decline on reconsideration. Petitions of appeal must conform to the requirements of §124.210 and will be handled in accordance with the procedures contained in §124.210 and part 134 of this title.

(3) *Final Agency Decision.* If a declined applicant does not request reconsideration of the decline or, if eligible under paragraph (c)(2) of this section, a declined applicant does not file an appeal with OHA within 45 days of the date of service of the decline letter, the determination of the AA/MSB&COD will become the final Agency decision. If the application is denied on reconsideration and the applicant does not appeal or have the right to appeal the denial under paragraph (c)(2) of this section, the decision of the AA/MSB&COD is the final Agency decision. If the applicant is entitled under paragraph (c)(2)

of this section to an appeal, and exercises that right, the decision of the Administrative Law Judge shall be the final Agency decision.

(4) *Reapplication for Program Participation.* A concern which has been declined for 8(a) program admission may reapply for admission to the program 12 months after the date of the final Agency decision to decline.

§ 124.207 8(a) Program exit.

A concern participating in the 8(a) program may leave the program by any of the following means:

- (a) Voluntary withdrawal.
- (b) Expiration of the Program Term established pursuant to § 124.110;
- (c) Graduation pursuant to the provisions of § 124.208;
- (d) Termination pursuant to the provisions of § 124.209.

§ 124.208 Program graduation.

(a) *General.* When an 8(a) concern is recognized as successfully completing the 8(a) program by substantially achieving the targets, objectives and goals set forth in its business plan prior to the expiration of its Program Term, and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) program, its participation within the program may be determined by SBA to be completed and the firm may be graduated from the program.

(b) *Graduation criteria.* In determining whether a concern has substantially achieved the goals and objectives of its business plan and has attained the ability to compete in the marketplace without 8(a) program assistance, the following factors, among others, shall be considered by SBA. Positive overall financial trends, including but not limited to:

- (1) Profitability;
- (2) Sales, including improved ratio of non-8(a) sales to 8(a) sales;
- (3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;
- (4) Ability to obtain bonding;
- (5) A positive comparison of the 8(a) concern's business and financial profile with profiles of non-8(a) businesses in the same area or similar business category; and

(6) Good management capacity and capability.

(c) *Graduation procedures.* (1) *Letter of notification.* Upon determination by the SBA pursuant to paragraph (b) of this section that an 8(a) concern should be graduated from the 8(a) program, SBA shall notify the Participant in writing of its intent to graduate in a letter of notification. The letter of notification shall set forth findings, based on the facts and in accordance with law and regulations, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification shall also provide the Participant 45 days from the date of service of the letter to submit in writing information which would explain why the proposed basis of graduation is not warranted.

(2) *Recommendation of the Division.* Following the 45 day response period, the Division Director will consider the facts of the proposed graduation, including all information submitted by the Participant. If the Division Director determines that graduation is not appropriate, he/she will so notify the Participant within 15 days of the close of the response period. If the Division Director determines that graduation is appropriate, he/she will recommend in writing to the AA/MSB&COD, within 15 days of the close of the response period, that the Participant be graduated.

(3) *Decision of the AA/MSB&COD.* Upon the recommendation of the Division Director, the AA/MSB&COD will consider the proposed graduation and the written record supporting it. If the AA/MSB&COD determines that program graduation is warranted, he/she will issue a Notice of Program Graduation to the Participant. If not, he/she will so notify the Participant.

(4) *Notice requirements.* A Notice of Program Graduation shall conform to the form, filing and service requirements of part 134 of this title, under which the appeal proceeding shall be conducted. The Notice of Program Graduation shall set forth findings, based on the facts and in accordance with law and regulations, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The Notice of Program Graduation shall also advise

the Program Participant that it may avail itself of an opportunity for an appeal by filing a petition in accordance with the provisions of § 124.210 and part 134 of this title.

(5) *Appeal to Office of Hearings and Appeals.* Procedures governing appeals of program graduation to the Office of Hearings and Appeals are set forth in § 124.210 and part 134.

(d) *Post-graduation.* After the effective date of a program graduation as provided for herein, an 8(a) concern is no longer eligible to receive any 8(a) program assistance. However, such concern is obligated to complete previously awarded 8(a) subcontracts, including any priced options which may be exercised.

[54 FR 34712, Aug. 21, 1989, as amended at 60 FR 29975, June 7, 1995]

§ 124.209 Program termination.

(a) *General.* Participation of a 8(a) business concern in the 8(a) program may be terminated by SBA prior to the expiration of the concern's Program Term for good cause. Examples of good cause include, but are not limited to, the following:

(1) Failure by the concern to continue to maintain its eligibility for program participation.

(2) Failure by the concern to maintain its status as a small business under the Small Business Act, as amended, and the regulations promulgated thereunder. *See* § 124.102.

(3) Failure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, full-time day-to-day management, and control by the person(s) who has (have) been determined to be socially and economically disadvantaged pursuant to these regulations.

(4) Failure by the concern to obtain written approval from SBA for any changes in ownership, management or control pursuant to §§ 124.103 and 124.104.

(5) Failure by the concern to disclose to SBA the extent to which nondisadvantaged persons or firms participate in the management of the section 8(a) business concern.

(6) A demonstrated pattern of failing to make required submissions or re-

sponses to the Administration in a timely manner, including:

(i) Failure by the concern to provide required financial statements to SBA pursuant to §§ 124.312(b)(4), 124.312(c)(7), and 124.501(c). Failure to provide SBA with requested tax returns, reports, or other available data within 30 days of the date of request.

(ii) Failure by the concern to submit an updated business plan within 30 days of receipt of request, without an extension of time which has been approved by SBA.

(iii) Failure by the concern to provide documents or certifications of continued eligibility or otherwise respond to requests for information relating to the section 8(a) program from SBA or other authorized government officials within the time frames provided for in the requests.

(7) Cessation of business operations by the concern.

(8) Failure by the concern to achieve the goals cited in its original or modified business plan as a result of repeated refusals to accept or utilize SBA assistance.

(9) Failure by the concern to pursue competitive and commercial business in accordance with the business plan, or failure to make reasonable efforts to achieve competitive status.

(10) Failure by the concern to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance or terminations for default with respect to contracts awarded under the authority of section 8(a).

(11) A pattern of inadequate performance of awarded section 8(a) procurement subcontracts by the concern.

(12) Failure by the concern to pay or repay significant financial obligations owed to the Federal Government.

(13) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters.

(14) Diversion of funds or other assets from the section 8(a) business concern or excessive withdrawals from such concern for the personal benefit of its disadvantaged owners or any person or entity affiliated with such owners

which is detrimental to the achievement of the targets, objectives, and goals contained in such Program Participant's business plan.

(15) Unauthorized use of business development expense funds and/or advance payment funds and/or SBA direct, guaranty or immediate participation loan proceeds; or violation of an advance payment, business development expense agreement, or loan agreement.

(16) Failure by the concern to obtain prior SBA approval of any management agreement, joint venture agreement or other agreement relative to the performance of a section 8(a) subcontract. Violation of any requirement of a management, joint venture, or other agreement approved by SBA by either the section 8(a) concern or one of the joint venturers.

(17) Failure by the concern to obtain approval from SBA before subcontracting under a section 8(a) subcontract, or failure by the concern to abide by any conditions imposed by SBA upon such approval.

(18) Violation by the concern of a section 8(a) subcontract provision which prohibits contingent fees and gratuities; or failure to disclose to SBA fees paid or to be paid, or costs incurred or committed to third parties, directly or indirectly, in the process of obtaining section 8(a) contracts or subcontracts, or violation of § 124.7.

(19) Knowing submission of false information to SBA, including false certification of compliance with non-8(a) business activity targets under § 124.312(c)(11), on behalf of a section 8(a) business concern by its principals, officers, or agents, or by its employees, where the principal(s) of the section 8(a) concern knows or should have known such submission to be false.

(20) Debarment, suspension, voluntary exclusion, or ineligibility of the concern or its principals pursuant to 13 CFR part 145, FAR subpart 9.4, 48 CFR Ch.1, and 48 CFR Ch. 22, or any successor regulation.

(21) Conviction of the concern, the individual(s) upon whom 8(a) program eligibility is based, or the director, officer or manager of tribally-owned concern, including one owned by an Alaska Native Corporation, or concern owned

by a Hawaiian organization is based for any offense indicating a lack of business integrity including, but not limited to:

(i) Commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract, or subcontract thereunder, or in the performance of such contract or subcontract;

(ii) Violation of the Organized Crime Control Act of 1970 (Pub. L. 91-452; 84 Stat. 922);

(iii) Embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the question of present responsibility as a government contractor;

(iv) Violation of any Federal anti-trust statute;

(v) Commission of any felony not specifically listed above; or

(vi) Violation of section 16 of the Small Business Act, (15 U.S.C. 645).

(22) Conviction of a nondisadvantaged owner, officer, or director of the concern for any offense described in paragraph (a)(21) of this section, provided that one or more disadvantaged owners or officers of the concern abetted, conspired with or otherwise acquiesced in the owner's or officer's commission of the offense.

(23) Willful failure on behalf of an 8(a) business concern to comply with applicable labor standards and obligations.

(24) Violation of any terms and conditions of the 8(a) Program Participation Agreement.

(25) Willful violation by an 8(a) business concern, or any of its principals, of any rule or regulation of the Administration pertaining to material issues.

(b) *Termination procedures.* (1) *Letter of notification.* When SBA determines that grounds exist to terminate a concern's participation in the 8(a) program pursuant to this section, SBA shall notify the Participant in writing of its intent to terminate in a letter of notification. The letter of notification shall set forth findings, based on the facts and in accordance with law and regulations, for every material issue relating

to the grounds upon which such termination would be based with specific reasons for each finding. The letter of notification shall provide the Participant 45 days from the date of service of the letter to submit in writing information which would eliminate the ground(s) for termination or would explain why the proposed ground(s) should not justify termination.

(2) *Recommendation of the Division.* Following the 45-day response period, the Division Director will have 15 days to consider the facts of the proposed termination, including all information submitted by the Participant. The Division Director may, if he/she deems it necessary, request additional information from the Participant. If the grounds for the proposed termination continue to exist, the Division Director shall recommend in writing to the AA/MSB&COD that the Participant be terminated.

(3) *Decision of the AA/MSB&COD.* Upon the recommendation of the Division Director, the AA/MSB&COD will consider the proposed termination and the written record supporting it. If the AA/MSB&COD determines that a termination is warranted, he/she will issue a Notice of Termination to the Participant. If not, he/she will so notify the Participant. Unless appealed to OHA, the decision of the AA/MSB&COD to terminate a Program Participant shall be effective 45 days after its issuance.

(4) *Notice requirements.* A Notice of Termination shall conform to the form, filing and service requirements of part 134 of this Title, under which the appeal proceeding shall be conducted. The Notice of Termination shall set forth findings, based on the facts and in accordance with law and regulations, for every material issue relating to the grounds upon which the termination is based. The Notice of Termination shall also advise the Program Participant that it may avail itself of an opportunity for an appeal by filing a petition in accordance with the provisions of § 124.210 and part 134 of this title.

(5) *Appeal to Office of Hearings and Appeals.* Procedures governing appeals of program termination to the Office of

Hearings and Appeals are set forth in § 124.210 and part 134 of this title.

(c) *Post-termination.* After the effective date of a program termination, an 8(a) business concern is no longer eligible to receive any section 8(a) program assistance. However, such concern is obligated to complete previously awarded 8(a) subcontracts, including any priced options which may be exercised. (See § 124.211 for Program Suspension).

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34903, Aug. 27, 1990; 60 FR 29975, June 7, 1995]

§ 124.210 Appeals to SBA's Office of Hearings and Appeals.

(a) Except as provided in paragraph (d) of this section, an applicant concern or Program Participant shall be afforded the opportunity to appeal any of the following Agency determinations:

(1) Denial of program admission based solely on a negative finding(s) of social disadvantage, economic disadvantage, ownership or control pursuant to § 124.206;

(2) Graduation pursuant to § 124.208;

(3) Termination pursuant to § 124.209; or,

(4) Denial of a request to issue a waiver pursuant to § 124.317.

(b) The applicant or Participant concern may initiate such appeal by filing a petition in accordance with part 134 of this title with SBA's Office of Hearings and Appeals (OHA) within 45 days of the date of service of the final Agency determination pursuant to paragraph (a) of this section. In addition to the requirements of § 134.203(a), the petition shall state, with specific reference to the determination and the record supporting such determination, the reasons why the determination is alleged to be arbitrary, capricious or contrary to law. Concurrent with its filing with OHA, the concern shall also serve the AA/MSB&COD and SBA's Office of General Counsel with a copy of the petition, including attachments. In the context of appeals relating to denials of program admission pursuant to § 124.206 or denials of requests for waivers pursuant to § 124.317, service on the Office of General Counsel shall be made by personal delivery or certified mail,

return receipt requested, to SBA's Associate General Counsel for General Law. For appeals relating to graduation pursuant to §124.208 or termination pursuant to §124.209, service on the Office of General Counsel shall be made by personal delivery or certified mail, return receipt requested, to SBA's Associate General Counsel for Litigation. Service should be addressed to the AA/MSB&COD and either Associate General Counsel at the Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(c) Appeal proceedings brought under the authority of this section shall be conducted by an Administrative Law Judge.

(d) The Administrative Law Judge selected to preside over an appeal shall decline to accept jurisdiction over any matter if:

(1) The appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the determination, including appeals of proposed denials of 8(a) program admission which have been based in whole or in part on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control;

(2) The appeal is untimely filed under § 134.202 or is not otherwise filed in accordance with the requirements of this section and the rules of procedure set forth in part 134 of this title; or

(3) The matter has been decided or is the subject of an adjudication before a court of competent jurisdiction over such matters.

(e) Once the Administrative Law Judge accepts jurisdiction over an appeal, subsequent initiation of an adjudication of the matter by a court of competent jurisdiction will not preclude the Administrative Law Judge from rendering a final decision on the matter.

(f) Proceedings conducted under the authority of this section shall be conducted in accordance with the provisions of this section and part 134 of this title.

(g) Unless it is established that the convenience and necessity of the parties requires otherwise, in the sole discretion of the Administrative Law Judge, any oral hearing conducted with

respect to an appeal pursuant to paragraph (a) of this section shall be held in the Washington, DC area.

(h)(1) Except as provided in paragraph (h)(3) of this section, any proceeding conducted under the authority of paragraph (a) of this section shall be decided solely on a review of the written administrative record. The determination by the AA/MSB&COD or a designee for matters related to paragraphs (a)(1), (a)(2), and (a)(3) of this section, and the determination by the Administrator for matters related to paragraph (a)(4) of this section, shall be sustained unless such determination is found to be arbitrary, capricious, or contrary to law.

(2) If the Administrative Law Judge determines that, due to the absence in the written administrative record of the reasons upon which the determination in question was based, such administrative record is insufficiently complete to decide whether the determination is arbitrary and capricious or contrary to law, the case shall be remanded by the Administrative Law Judge to the AA/MSB&COD for further consideration in accordance with the terms of such remand. Such remand shall be for a period of no more than 10 working days. The ALJ shall retain jurisdiction of the matter during such period as the matter is on remand.

(3)(i) Neither the admission of evidence beyond the written administrative record, nor any form of discovery, will be permitted in proceedings under this section unless it is first determined by the Administrative Law Judge that the applicant concern or Participant, upon written submission, has made a substantial showing, based upon credible evidence, and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior. Prior to any such determination, the Agency shall be afforded an opportunity to respond in writing to the submission of the applicant concern or Participant. Upon a determination by the Administrative Law Judge that the applicant concern or Participant has made such a substantial showing, the Administrative Law Judge may permit

appropriate discovery, and accept relevant evidence beyond the written administrative record, which is specifically limited to the alleged bad faith or improper behavior asserted by the applicant concern or Participant.

(ii) A determination by the Administrative Law Judge that the required showing set forth in paragraph (h)(3)(i) of this section has been made does not shift the burden of proof, which continues to rest with the applicant concern or the Participant.

(i) A decision rendered by the Administrative Law Judge under the authority of this section shall be the final decision of the Administration and shall be binding upon the parties and those within the employ of the Administration.

(j) Such decision shall be rendered, insofar as practicable, within ninety days after a petition for appeal is filed, and, in the event such 90-day time limit has not been met, the Administrative Law Judge shall indicate the reason therefor in the decision, when issued.

[54 FR 34712, Aug. 21, 1989, as amended at 57 FR 28780, June 29, 1992; 61 FR 2691, Jan. 29, 1996]

§ 124.211 Suspension of program assistance.

(a) At any time after the issuance of an initial letter of notification of termination pursuant to § 124.209(b)(1), the AA/MSB and COD may suspend contract support and all other forms of 8(a) program assistance to that concern for a period of time not to exceed the time necessary to resolve the issue of the concern's termination from the program under the procedures set forth in § 124.209 and in part 134 of this title. The institution of such a suspension will not occur in conjunction with each proposed termination, but will only occur when SBA determines that suspension of the concern's program participation is needed to protect the interests of the Government. For example, SBA will generally find that it is in the best interests of the Government to suspend a Participant where the proposed termination is based on fraud or the submission of false statements or program ineligibility.

(b) Immediately upon SBA's determination to suspend an 8(a) concern, SBA will furnish that concern with a Notice of Suspension by certified mail, return receipt requested, to the last known address of the concern. If no receipt is returned within ten calendar days from the mailing of the notice, notice will be presumed to have occurred as of that time. The Notice of Suspension will provide the following information:

(1) The reason(s) for the suspension;

(2) A statement that the suspension will continue pending the completion of further investigation or final program termination proceeding or some other specified period of time;

(3) Notice that awards of competitive and non-competitive section 8(a) subcontracts, including those which have been "self-marketed" by an 8(a) concern, will not be made during the pendency of the suspension unless it is determined by the head of the relevant procuring agency or his/her authorized representative to be in the best interest of the Government to do so, and SBA adopts that determination;

(4) Notice that the concern is obligated to complete previously awarded section 8(a) subcontracts;

(5) Notice that the suspension is effective nationally throughout the SBA;

(6) A statement that a request for a hearing on the suspension will be considered by an Administrative Law Judge in SBA's Office of Hearings and Appeals (OHA), and granted or denied as a matter of his/her discretion.

(7) A statement that the firm's Program Term is suspended effective the date of the suspension and that it will resume only if the concern's participation in the program is not terminated.

(c) It is contemplated that in most cases a hearing on the issue of the suspension will be afforded if the Participant requests one. However, no hearing shall be granted if the suspension is based upon advice from either the Department of Justice or the Department of Labor that such a hearing would prejudice substantial interests of the Government.

(d) The applicant concern may appeal a Notice of Suspension by filing a petition in accordance with part 134 of this title with OHA within 30 days of the

§ 124.300

date of service of a Notice of Suspension pursuant to paragraph (b) of this section. Concurrent with its filing with OHA, the concern shall also serve the AA/MSB&COD and SBA's Office of General Counsel with a copy of the petition, including attachments. Service on the Office of General Counsel shall be made by personal delivery or certified mail, return receipt requested, to SBA's Associate General Counsel for General Law.

(e) A request for a hearing on the suspension will be considered by an Administrative Law Judge in OHA, and granted as a matter of his/her discretion.

(f) Proceedings conducted under the authority of this section shall be conducted in accordance with the provisions of this section and part 134 of this title.

(g) For any oral hearing convened pursuant to §134.222 of this title resulting from a request filed in accordance with this section, the Administrative Law Judge shall give due regard to the convenience and necessity of the parties or their authorized representatives in designating the place of the oral hearing.

(h) A hearing on the suspension will commence as soon as possible following the decision of the Administrative Law Judge to grant a request, but in no case more than 20 calendar days after the Administrative Law Judge's ruling if the request is granted.

(i) At the close of such suspension hearing, the Administrative Law Judge shall issue a decision upholding or lifting the suspension. The decision of the Administrative Law Judge shall be the final Agency decision.

(j) Any program suspension which occurs in accordance with these regulations will continue in effect until such time as the SBA lifts the suspension or the 8(a) concern's participation in the program is fully terminated. If all program assistance to an 8(a) concern has been suspended under these regulations and the concern's participation in the program is not terminated, the suspension will be lifted and the Program Term remaining as of the effective date of Program Suspension will be restored to the concern. However, nothing in this paragraph precludes SBA from ini-

13 CFR Ch. I (1-1-98 Edition)

tiating termination, graduation or suspension proceedings at any time during the concern's Program Term.

(k) SBA does not recognize the concept of *de facto* suspension. Reinstatement of the remaining portion of a Program Term will occur only where a concern's program participation has been formally suspended by SBA in accordance with the procedures set forth in this section.

[54 FR 34712, Aug. 21, 1989, as amended at 57 FR 28780, June 29, 1992; 61 FR 2691, Jan. 29, 1996]

§ 124.300 Business development.

The regulations at §124.301 through §124.321 address the provision of various forms of assistance to 8(a) Program Participants to promote the business development of such concerns. Such assistance includes financial, management and technical assistance, and contract support.

§ 124.301 Development of business plan.

(a) *General.* In order to assist the SBA in determining the business development needs of each 8(a) Program Participant, each such Participant shall develop a comprehensive business plan, setting forth the Participant's business targets, objectives, and goals. The business plan shall be submitted to the SBA servicing field office in final form promptly after the Participant's receipt of notice of certification to participate in the 8(a) program. The Participant will not be eligible for 8(a) Program benefits, including contracts until the SBA approves its business plan. The approved business plan will constitute the Participant's short and long term goals and the strategy for developmental growth to the point of economic viability independent of the 8(a) program.

(b) *Standard Industrial Classification (SIC) code designations.* The concern's primary industry classification as defined in §124.100 and all related secondary Standard Industrial Classification (SIC) code designations shall be stated in an 8(a) concern's original business plan. Such SIC codes may be changed, and new SIC codes may be added to the

business plan, however, where the conditions of § 124.302(c) are met. Once admitted to the 8(a) program, a concern will only be permitted to perform 8(a) contracts which are classified under approved SIC codes which appear in its business plan. An 8(a) concern may receive a Federal contract classified under a SIC code not contained in its business plan where the contract is not awarded through the section 8(a) program.

(c) *Contents of business plan.* The initial business plan shall contain at least the following:

(1) An analysis of market potential, competitive environment, and other business analyses estimating the Program Participant's prospects for profitable operations during the term of program participation and after graduation;

(2) An analysis of the Program Participant's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the Participant from receiving contracts other than those awarded through the 8(a) Program;

(3) Specific targets, objectives, and goals for the business development of the Participant during the next two years, utilizing the results of the analyses conducted pursuant to paragraphs (c)(1) and (c)(2) of this section;

(4) Estimates of contract awards pursuant to section 8(a) and from other sources which would be needed by the Participant to meet the specific targets, objectives and goals for the years covered by the business plan; and

(5) Such other information as SBA may require.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34903, Aug. 27, 1990]

§ 124.302 Review and modification of business plan.

(a) *Annual review.* Each Participant shall annually review its currently approved business plan with the Business Opportunity Specialist (BOS) and shall modify such plan as may be appropriate. Any modified plan shall be submitted to the BOS for approval. A currently approved plan shall be considered the applicable plan for all pro-

gram purposes until the SBA approves in writing a modified plan. SBA shall establish an anniversary date for review of the Participant's business plan and contract support forecasts. The annual review of a Participant's business plan will generally occur within 15 working days before or after the anniversary of the firm's certification of 8(a) eligibility.

(b) *Contract support forecast.* Each Participant shall annually forecast in writing its needs for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (a) of this section. Such forecast shall be included in the Participant's business plan. The forecast shall include:

(1) The aggregate dollar value of contract support to be sought under section 8(a) (sole source and competitive), reflecting compliance with the business mix requirements of § 124.312;

(2) The aggregate dollar value of non-8(a) contracts to be sought;

(3) The types of contract opportunities being sought, identified by the appropriate Standard Industrial Classification (SIC) code; and

(4) Such other information as may be requested by the SBA to aid in providing effective business development assistance to the Participant.

(c) *Changes in SIC code designations.*

(1) Requests for changes in SIC code designations stated in a business plan shall be approved by SBA if it is determined that:

(i)(A) A sound business explanation exists for obtaining the requested SIC code, including, for example, the acquisition of the capability to perform contracts in an industry, even if unrelated to the 8(a) concern's primary SIC code;

(B) The 8(a) concern has demonstrated capacity and capability to perform in the requested SIC code; and

(C) Other applicable eligibility criteria (Walsh-Healey Act, the non-manufacturer rule, size rules, etc.) appear to be met; or

(ii) SBA erred in omitting a previously requested and supported SIC code, improperly classifying a business industry or making a typographical or other error in its letter of approval to the 8(a) concern.

(2) SBA will make a decision on such request within 30 days from the date it receives the request.

(d) *Transition management plan.* Beginning in the first year of the transitional stage of program participation under § 124.303, each Participant shall annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations after graduation. The transition management plan should be submitted to the BOS at the same time other modifications are submitted pursuant to the annual review under paragraph (a) of this section. Such plan shall set forth the same information as required under paragraph (b) of this section for the initial plan, incorporate the competitive mix requirements of § 124.312, and provide specific transition steps the Participant will take to continue its business development after the expiration of its Program Term.

[54 FR 34712, Aug. 21, 1989, as amended at 60 FR 29976, June 7, 1995]

§ 124.303 Stages of 8(a) program participation.

(a) *General.* Program participation is divided into two stages—a developmental stage and a transitional stage. For firms approved for 8(a) program participation after November 15, 1988, the developmental stage shall be 4 years and the transitional stage shall be 5 years unless the Participant has exited the program by one of the means set forth in § 124.110. The developmental stage is designed to assist participants to overcome their economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist Participants to overcome, insofar as practicable, the remaining elements of economic disadvantage and to prepare Participants for leaving the 8(a) program.

(b) *Stages for grandfathered Program Participants.* (1) For Program Participants with five or fewer years remaining in the 8(a) program as of August 15, 1989, the program year they are in on

August 15, 1989 shall be considered the first year of the transitional stage. Such Participants shall be subject to the modified business targets set forth in § 124.312.

(2) For concerns with more than five years remaining in the 8(a) program as of August 15, 1989, the stages of program participation shall be determined so that the Participant will have five years in the transitional stage. The remaining time in the program shall be considered time in the developmental stage. For example, if a Participant has seven years remaining in the program as of August 15, 1989, it will be considered to have 2 years remaining in the developmental stage and five years in the transitional stage.

(c) *Developmental stage of program participation.* A Program Participant, if otherwise eligible, shall be qualified to receive the following assistance during the developmental stage of program participation:

(1) Sole source and competitive 8(a) contract support;

(2) Financial assistance pursuant to § 122.59 of this title;

(3) Pursuant to § 124.306, financial assistance from SBA for skills training or upgrading for employees or potential employees of Program Participants;

(4) The transfer of technology or surplus property owned by the United States to Program Participants by grant, license, or sale. Technology or property transferred pursuant to this paragraph must be used by the Participant during the normal conduct of its business operation and cannot be sold or transferred to any other party (other than the Government) during such concern's Program Term and for one year thereafter. A Participant must agree to these conditions prior to any transfer of technology or property; and

(5) Training sessions to assist individuals and enterprises eligible to receive 8(a) contracts in the development of business principles and strategies to enhance their ability to compete successfully for contracts in the marketplace.

(d) *Transitional stage of program participation.* A Program Participant, if otherwise eligible, shall be qualified to

receive the following assistance during the transitional stage of program participation:

(1) The same assistance as that provided to Participants in the developmental stage under paragraphs (c)(1), (c)(2), (c)(4) and (c)(5) of this section;

(2) Assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the Participant and other Program Participants or other business concerns, in accordance with all applicable statutes and regulations, with respect to contracting opportunities for research, development, fullscale engineering or production of major systems. In the case of a requirement to be procured as a Small Business Set-aside, a Small Disadvantaged Business Set-aside, or through the 8(a) program, applicable size regulations will apply in determining whether the cooperative venture between a Participant and another business entity qualifies as a small business concern; and

(3) Training and technical assistance in transitional business planning.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34903, Aug. 27, 1990; 60 FR 29976, June 7, 1995]

§§ 124.304—124.305 [Reserved]

§ 124.306 Financial assistance for skills training.

(a) SBA may pay in whole or in part the costs of training or upgrading of employees or potential employees of 8(a) concerns. An owner participating in the day-to-day management of a Participant may be considered to be an employee for purposes of this section. Payments may be made directly to the training provider or by reimbursing the Program Participant or the Participant's employee, if such reimbursement is found to be reasonable and appropriate.

(b) SBA assistance under this section is subject to the following conditions and requirements:

(1) The concern must be in the developmental stage of program participation.

(2) The 8(a) concern must document that it has explored the use of existing cost-free or cost-subsidized training

programs offered by public and private sector agencies working with programs of employment and training and economic development and that no such programs are available or are capable of meeting the training needs of the participant.

(3) The concern must be current with any reporting requirements established by SBA for ongoing program participation.

(4) The employee receiving the training or upgrading may not be a beneficiary of any other publicly or privately funded training program which benefits the trainee or upgraded employee for the same activity SBA is compensating under this section.

(5) The training provider must be an institution of higher education, a community or vocational college, or an institution eligible to provide skills training under the Job Training Partnership Act (29 U.S.C. 1501, *et seq.*).

(6) The training provider may not be debarred or suspended from any Federal programs.

(7) The training of employees or potential employees of a concern must be consistent with the concern's approved business plan.

(8) SBA must approve the training in writing prior to its commencement.

(9) No more than five employees or potential employees of a single 8(a) concern may be recipients of benefits under this section at one time.

(10) The length of training or skills upgrading financed under this section may be no less than one month nor more than six months.

(11) The training of skills upgrading assistance must be of a type which will offer genuine capacity development for the employing firm.

(12) No more than \$2,500 shall be made available for any one employee or potential employee.

(13) The Participant must execute and submit to SBA any appropriate written employment agreements in accordance with paragraph (f) of this section.

(c) SBA's allocation of resources appropriated for the purposes of this section shall generally be based on the identification of needs of developmental stage concerns. SBA shall evaluate training needs in the annual

business plan review process, and may conduct other surveys as appropriate.

(d) Projects to be funded under this section shall be initiated by a request prepared by the 8(a) concern and submitted to SBA. SBA may request additional information before the request is processed.

(e) Assistance under this section will be made only when the agreements entered into by SBA to fund training or upgrading contain acceptable training and upgrading standards and acceptable monitoring standards and requirements to insure the integrity and effectiveness of the training or upgrading.

(f) The Participant must give adequate assurance that it will employ the trainee or upgraded employee for at least six months after the training or upgrading financed pursuant to this section has been completed. Trainees and upgraded employees must provide a similar assurance that they will remain in the employ of the 8(a) firm for such six-month period. Such assurance will consist of an appropriate written employment agreement. If a trainee or upgraded employee does not remain in the employ of the participant for at least six months after receiving such SBA-financed training or upgrading, the violating party must reimburse SBA for the amount expended together with any reasonable interest and costs incurred for collection. In addition, the violating party, whether it is the Participant, individual trainee or upgraded employee, shall be barred from receiving any further assistance under this section. The appropriate SBA Regional Administrator, or his/her designee, may waive the reimbursement provisions of this paragraph in limited circumstances where an employee's leaving is due to an unforeseen event (e.g., the employee's spouse is relocated by his/her business and the employee must move).

§ 124.307 Contractual assistance.

(a) It is the policy of SBA to enter into contracts with other Government agencies and to subcontract the performance of such contracts, pursuant to section 8(a)(1)(C) of the Small Business Act, to 8(a) Program Participants at prices which will enable such con-

cerns to perform the contracts and earn a reasonable profit.

(b) Such subcontracts may either be sole source awards or awards attained through competition reserved for eligible Participants.

(c) Admission into the 8(a) program does not bestow a right to receive 8(a) contracts. SBA's approval of a Participant's business plan pursuant to § 124.301 does not guarantee the Participant any particular level of contract support.

(d) While a Program Participant's projected level of 8(a) contract support is required as part of its business plan under § 124.302(b) as a planning and development tool, the level approved by SBA will not prevent contract awards above that level so long as SBA determines the concern to be competent and responsible to perform any such contracts and the Participant is in compliance with any applicable competitive business mix requirement, or approved remedial plan, imposed by § 124.312.

(e) An 8(a) contract will be provided to a Participant only when such contract is consistent with the Participant's capabilities and business development needs, as determined by SBA.

(f) Except as provided in § 124.311(i), an 8(a) concern must be an eligible Program Participant on the date of contract award.

[54 FR 34712, Aug. 21, 1989, as amended at 59 FR 12815, Mar. 18, 1994; 60 FR 29976, June 7, 1995]

§ 124.308 Procedures for obtaining and accepting procurements for the 8(a) program.

(a) *PCR-serviced agencies.* If an SBA Procurement Center Representative (PCR) is resident or has liaison responsibilities in a procuring agency, he/she will be responsible for screening proposed procurements for possible 8(a) contracts, in accordance with 13 CFR 125.6.

(b) *Requirement identification.* (1) A requirement for possible award may be identified by SBA, a particular Program Participant or the procuring agency itself. Once a requirement that appears suitable for the 8(a) program has been identified, SBA shall verify the appropriateness of the SIC code

designation assigned to the requirement and request the procuring agency to offer the requirement to the 8(a) program.

So long as the SIC code assigned to the requirement by the procuring agency contracting officer is reasonable, the SIC Code will be accepted by SBA.

(2) If SBA and the procuring agency are unable to agree as to the proper SIC code designation for the requirement, SBA may refuse to accept the requirement for the 8(a) program, or appeal the contracting officer's determination to the head of the agency pursuant to § 124.320, or the AA/MSB & COD may file a SIC code appeal to SBA's Office of Hearings and Appeals.

(3) If the requirement exceeds the thresholds established by § 124.311, the SBA will request that the requirement be offered to the 8(a) program to be competed among eligible Program Participants, unless SBA determines that there is not a reasonable expectation that at least two eligible 8(a) concerns will submit offers.

(4) If the requirement is below the thresholds established by § 124.311, the SBA may request that it be offered to the 8(a) program for possible sole source award as an open requirement or in support of the approved business plan of a specific Program Participant, or it may accept the requirement for competition upon the procuring agency's request.

(c) *Offering letter.* When a requirement is offered to the 8(a) program, the offering letter or notification from the procuring activity shall contain the following information.

(1) A description of the work to be performed or items to be delivered and a copy of the statement of work, if available;

(2) The estimated period of performance;

(3) The SIC code that applies to the principal nature of the acquisition;

(4) The anticipated dollar value of the requirement, including options, if any;

(5) Any special restrictions or geographical limitations on the requirement;

(6) The location of the work to be performed for construction and service procurements;

(7) Any special capabilities or disciplines needed for contract performance;

(8) The type of contract to be awarded, such as firm fixed price, cost reimbursement, or time and materials;

(9) The acquisition history, if any, of the requirement;

(10) The names and addresses of any small business contractors which have performed on this requirement during the previous 24 months;

(11) A statement that no solicitation for the specific acquisition has been issued as a small business set-aside or small disadvantaged business set-aside and that no other public communication (such as a notice in the Commerce Business Daily) has been made evidencing the procuring agency's clear intention to set aside the acquisition for small business or small disadvantaged business (*see* § 124.309(a));

(12) Identification of any particular 8(a) concern designated for consideration, including a brief justification, such as one of the following:

(i) The 8(a) concern, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated concern is the incumbent;

(13) Bonding requirements, if applicable;

(14) Identification of all 8(a) concerns which have expressed an interest in being considered for the acquisition;

(15) If the requirement is a national buy, identification of all SBA district or regional offices which have asked for the acquisition for the 8(a) program;

(16) A request that the acquisition be competitive, if appropriate, and the estimated contract value is under the applicable threshold; and

(17) Any other information that the procuring agency deems relevant or SBA requests.

(d) *Acceptance of the requirement.* Upon receipt of the procuring agency's offer of a procurement requirement, SBA will determine whether it will accept the requirement for the 8(a) program. SBA's decision whether to accept the requirement will be transmitted to the procuring agency in writing

within 15 working days of receipt of the written offering letter, unless SBA requests, and the procuring agency grants, an extension. SBA is not required to accept any particular procurement offered to the 8(a) program.

(1) Where SBA decides to accept an offering of a sole source 8(a) procurement, SBA will accept the offer both on behalf of the program and in support of the approved business plan of a specific 8(a) Program Participant.

(2) Where SBA decides to accept an offering of a competitive 8(a) procurement, SBA will accept the offer for the 8(a) program generally.

(3) Except for requirements assigned a construction SIC code by the procuring agency contracting officer, all competitive 8(a) requirements accepted by SBA may be competed among all eligible 8(a) Program Participants nationally. The only geographic restrictions pertaining to 8(a) competitive requirements, other than those for construction requirements, would be those imposed by the solicitations themselves.

(e) *Sole source award where procuring agency nominates a specific program participant.* If the procuring agency identifies a particular 8(a) concern for a sole source award, SBA will determine whether an appropriate match exists.

(1) Once a procurement is deemed suitable for acceptance as an 8(a) sole source contract, it will normally be accepted on behalf of the participant recommended by the procuring agency, provided that:

(i) The procurement is consistent with the Participant's business plan;

(ii) The Participant is determined by SBA to be a responsible contractor with respect to performance of the contract; and

(iii) The award of the contract would not result in the Participant exceeding its business mix requirements established under § 124.312.

(2) If an appropriate match exists, SBA will send a letter accepting the offer in support of the business plan of the identified Participant to the procuring agency. This letter will advise the procuring agency whether SBA will participate in contract negotiations or whether SBA will authorize the procuring agency to negotiate directly with the identified Program Participant. A

Program Participant selected by SBA to perform a noncompetitive 8(a) contract shall, when practicable, participate in any negotiation of the terms and conditions of such contract.

(3) If SBA determines that an appropriate match with the nominated 8(a) concern does not exist based on the factors set forth in paragraph (e)(1) of this section, it will notify the affected 8(a) concern and may then select an alternate 8(a) concern, in accordance with paragraph (f)(3) of this section. It will so advise the procuring agency of its actions.

(f) *Open requirements.* When a procuring agency does not nominate a particular concern for performance of a sole source 8(a) contract (open requirement), the following additional procedures will apply:

(1) If the procurement is a construction requirement, SBA will examine the portfolio of 8(a) concerns for the SBA district office where the work is to be performed for selection of a qualified 8(a) concern. If none is found to be qualified or a match for a concern in that district is determined to be impossible or inappropriate, the requirement may be considered for other 8(a) concerns located within the region or, if appropriate, other regions.

(2) If the procurement is anything other than a construction requirement, SBA may select any eligible, responsible Program Participant nationally to perform the contract.

(3) In cases in which SBA must select a participant for possible award from among two or more eligible and qualified participants, the selection will be based upon consideration of relevant factors, including the business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, and technical capability of each participant. SBA shall make its selection based upon an examination of the business plan and procurement history of the concern as well as any supplemental materials requested and received.

(4) To the maximum extent practicable, the SBA shall promote the equitable geographic distribution of 8(a) sole source contracts.

(g) *Formal technical evaluations.* SBA will not authorize formal technical evaluations for sole source 8(a) contracts. If a procuring agency requires the performance of a formal technical evaluation among more than one 8(a) concern, the procuring agency must request that the requirement be a competitive 8(a) award. The procuring agency may request a formal two-step procurement process pursuant to section 14.5 of the FAR, 48 CFR subpart 14.5, or a standard negotiated competitive procurement. Agencies may, however, conduct informal assessments of several 8(a) firms' capabilities to perform a specific requirement, provided that the statement of work for the requirement is not released to any of the participating 8(a) firms.

(h) *Repetitive acquisitions.* In order for repetitive acquisitions to be awarded through the 8(a) program, there must be separate offers and acceptances. This enables the SBA to reassess a firm's eligibility, to evaluate the suitability of each acquisition for competitive 8(a) award, and to determine whether the requirement should continue under the 8(a) program.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34903, Aug. 27, 1990; 60 FR 29976, June 7, 1995]

§ 124.309 Barriers to acceptance.

SBA will not accept for 8(a) award proposed procurements not previously in the 8(a) program if any of the circumstances identified in paragraphs (a), (b), or (c) of this section exist.

(a) *Solicitation previously issued.* A solicitation has already been issued for the procurement as a small business set-aside, such as an Invitation for Bid (IFB) or Request for Proposal (RFP). The AA/MSB&COD may permit the acceptance of the requirement, however, under extraordinary circumstances, such as where a procuring agency had made a decision to offer the requirement to the 8(a) program before the solicitation was sent out and the procuring agency acknowledges and documents that the solicitation was in error.

(b) *Reservation as small business or SDB set-aside.* The procuring agency has expressed publicly a clear intention to reserve the procurement as a small

business or small disadvantaged business (SDB) set-aside (e.g., a notice of intent to set aside a procurement published in the Commerce Business Daily which invites a response from interested small businesses). The AA/MSB&COD may permit the acceptance of the requirement, however, under extraordinary circumstances, such as where a procuring agency had made a decision to offer the requirement to the 8(a) program before the notice was sent out and the procuring agency acknowledges and documents that the notice was in error. An annual procurement forecast or solicitation of information for possible small business set aside will generally not be considered as a clear exhibition of intention to set aside a procurement for small businesses.

(c) *Adverse Impact.* SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on other small business programs or on an individual small business, whether or not the affected small business is in the 8(a) program. The adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) program. Adverse impact does not apply to "new" requirements. A new requirement is a requirement which has not been previously procured by the relevant procuring agency. Where a requirement is new, no small business could have performed the requirement and, thus, an impact determination need not be performed. The expansion or alteration of an existing requirement shall be considered a new requirement where the requirement is materially expanded or modified so that the ensuing requirement is not substantially similar to the prior requirement due to the magnitude of the expansion or alteration.

(1) In determining whether or not adverse impact exist, all relevant factors will be considered.

(2) SBA presumes adverse impact to exist when a small business concern has performed a specific requirement for at least 24 months, it is currently performing the requirement or finished such performance within 30 days of the

procuring agency's offer of the requirement for the 8(a) program, and the estimated dollar value of the offered 8(a) award is 25 percent or more of its most recent annual gross sales (including those of its affiliates).

(d) *Release for non-8(a) competition.* In limited instances, SBA may determine that a sole source 8(a) contract being performed by either a Program Participant whose Program Term will expire prior to contract completion, or, by a former Program Participant whose Program Term has expired within one year of the date of the offering letter for the proposed procurement may be rejected so that it may be competed outside the 8(a) program. If such a determination is made, SBA will reject the procuring agency's offer of the requirement for award through the 8(a) program. In such a case, SBA will recommend that the requirement be procured as a small business set-aside or, where appropriate, through a small disadvantaged business competition authorized by Pub. L. 99-661.

(1) In making such a determination, SBA will balance the importance of the contract for the (former) Participant's stability and business development needs against the needs of other Program Participants qualified to perform the requirement in order to develop in accord with their business plan. Such a determination will include consideration of whether the rejection of the requirement would seriously reduce the pool of similar types of contracts to be fulfilled through the 8(a) program. In making such determination, SBA will also seek the views of the procuring agency.

(2) A written request for the rejection of a contract must be made to SBA by the applicable (former) Participant prior to SBA's acceptance of the requirement for the 8(a) program. SBA will not reject a requirement absent such a request.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34903, Aug. 27, 1990]

§ 124.310 Approval of lower tier subcontractors.

(a) SBA's approval must be obtained prior to a Participant's subcontracting of the performance of an 8(a) contract to another concern.

(b) SBA will not approve any subcontracting arrangement where:

(1) The performance of work requirements set forth in § 124.314 would not be met;

(2) The proposed subcontractor has been suspended, debarred, or determined to be ineligible by any Federal agency;

(3) SBA determines that the proposed subcontractor would control the performance of the requirement;

(4) SBA determines that the proposed subcontracting relationship is not an arms length agreement; or

(5) SBA determines that the proposed subcontracting arrangement is an attempt to circumvent SBA's size regulations.

§ 124.311 8(a) competition.

(a) *Competitive thresholds.* A contract opportunity offered to the 8(a) program for award shall be awarded on the basis of a competition restricted to eligible Program Participants if:

(1) There is a reasonable expectation that at least two eligible program participants will submit offers and that award can be made at a fair market price; and

(2) The anticipated award price of the contract, including options, will exceed \$5,000,000 for contracts assigned manufacturing Standard Industrial Classification (SIC) codes and \$3,000,000 for all other contracts.

(i) For *all* types of contracts, the applicable competitive threshold amounts will be applied to the procuring agency estimate of the total value of the contract, including all options.

(ii) Where a procuring agency good faith estimate of the total value of a proposed 8(a) contract is less than the applicable competitive threshold amount and the requirement is accepted as a sole source requirement on that basis, award may be made even though the ultimate price arrived at through negotiations exceeds the competitive threshold, provided that the ultimate price is not significantly greater than the competitive threshold amount.

Example If the anticipated award price for a professional services requirement is determined to be \$2.7 million and it is accepted as a sole source 8(a) requirement on that basis, a sole source award will be valid even if the

contract price arrived at after negotiation is \$3.1 million.

(iii) A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount shall not be divided into several requirements for lesser amounts in order to use 8(a) sole source procedures for award to a single contractor.

(b) *Exemption from competitive thresholds for 8(a) concerns owned by Indian tribes.* SBA may award an 8(a) sub-contract on a non-competitive basis to an 8(a) concern owned and controlled by an economically disadvantaged Indian tribe, as defined in § 124.100, even if such contract exceeds the competitive thresholds set forth in paragraph (a) of this section. See generally, § 124.112. However, once a requirement is accepted into the 8(a) program for competition and prospective offerors have been notified of such acceptance, SBA may not remove the requirement from competition and award it to a disadvantaged Indian tribe as a sole source contract.

(c) *Competition below thresholds.* The AA/MSB&COD may, on a nondelegable basis, approve a request from a procuring agency that an 8(a) contract be competed even if the anticipated award price is not expected to exceed the dollar amounts specified in paragraph (a) of this section. Such approvals will be granted on a limited basis.

(1) This authority will be used primarily in areas where technical competitions are appropriate or when a large number of responsible 8(a) contractors exists.

(2) In determining whether to approve a request to compete an 8(a) contract below the applicable threshold amount, the AA/MSB&COD shall consider whether the requesting agency has made and will continue to make available a significant number of its contracts to the 8(a) program on a non-competitive basis.

(3) The AA/MSB&COD shall deny a request to compete a contract having a dollar figure below the applicable threshold amount where the requirement was previously offered to the 8(a) program on a noncompetitive basis if he/she concludes that the request is based on the inability of the contracting agency and the Participant se-

lected to perform the contract to reach an agreement on price or some other material term or condition.

(d) *Sole source above thresholds.* Where a contract opportunity exceeds the applicable threshold dollar figure and there is not a reasonable expectation that at least two eligible Program Participants will submit offers at a fair price, SBA may accept the requirement for a sole source 8(a) award if SBA determines that an eligible participant in the 8(a) portfolio is capable of performing the requirement at a fair price. SBA will accept a contract opportunity above the applicable competitive threshold as a sole source 8(a) requirement only if there are not two eligible offerors in the United States capable of performing the requirement at a fair price.

(e) *Procedures for competition.* (1) Competitions among eligible 8(a) participants shall be conducted by the procuring agencies in accordance with the Federal Acquisition Regulation (FAR). Such competitions shall be representative of competitions which are the normal practice in the relevant industries. Competitions need not stress price as the dominant factor, but may be based primarily on technical evaluations or other non-price related factors. Selection of a particular Program Participant by the procuring agency shall be based on specific evaluation criteria set forth in the solicitation.

(2) All solicitations for competitive 8(a) requirements shall include the appropriate SIC code for the requirement.

(3) The procuring agency shall evaluate offers pursuant to the evaluation criteria in the solicitation and the applicable FAR provisions.

(4)(i) In a sealed bid acquisition, upon the receipt of offers, the procuring agency shall submit to SBA a list of offerors ranked in the order of their standing for award (that is, lowest bid, second low bid, etc.) with the total evaluated price for each offer, differentiating between basic requirements and any options.

(ii) In a negotiated acquisition, the procuring agency shall transmit to SBA the offeror determined by the procuring agency to be the apparent successful offeror. Such a referral generally shall be made at the time the

procuring agency transmits the 8(a) contract documents to SBA for signature, unless the contracting officer has made a responsibility referral to SBA under FAR 19.809. In the case of such a referral, SBA shall determine eligibility when the responsibility referral is made to SBA, and may determine responsibility both at the time of the referral and at the time of award.

(iii) Eligibility shall be determined as of the date of a Participant's submission of its initial offer which includes price. In addition, eligibility is determined for each competitive 8(a) acquisition independent of other 8(a) acquisitions for which a Participant has submitted an offer, but for which no award has been made.

(5) Within 5 working days after receipt of the procuring agency's request for an eligibility determination, the SBA will determine whether any firm identified is eligible for award of the contract, including:

(i) Whether it has the SIC code for the requirement in its approved business plan;

(ii) Whether it is small under the SIC code for the requirement;

(iii) If the procurement is to be restricted within a particular stage of program participation or a particular geographical area, whether the firm is within the required stage of development or location; and

(iv) If the firm is in the transitional stage of program participation, whether it has achieved its competitive business mix targets under §124.312, or is in compliance with a remedial plan that does not include the denial of future 8(a) contracts.

(6) If the low bidder in a sealed bid procurement is determined to be ineligible by SBA, SBA shall determine the eligibility of the next low bidder. This process shall be repeated until SBA determines that an identified participant is eligible for award, or until the list is exhausted.

(7) In a negotiated procurement, the procuring agency will evaluate the offers of those firms determined by SBA to be eligible for award pursuant to paragraph (e)(5) of this section and will conduct discussions and/or negotiations with those firms deemed appropriate.

(8) After negotiations and/or discussions occur in a negotiated procurement, the potential awardee will be selected by the procuring agency.

(9) Award shall be made through the normal 8(a) award procedures (i.e., a prime contract between the procuring agency and SBA and a subcontract between SBA and the selected 8(a) concern).

(f) *Protest restrictions.* The eligibility of a Program Participant for a competitive 8(a) award may not be challenged by another Program Participant or any other party to SBA or to any other administrative forum as part of a bid or other contract protest. Anyone with information concerning the eligibility of a Program Participant to continue participation in the 8(a) program may submit such information to SBA in accordance with §124.111(c).

(g) *Restricted competition.* (1) *Competition within stages of program participation.* SBA may accept a requirement to be awarded through a competition limited to 8(a) concerns in the developmental stage of program participation or limited to concerns in the transitional stage of program participation, or may accept a requirement to be competed among firms both in the developmental and transitional stages of program participation.

(2) *SIC code requirements.* Only those Participants that have in their approved business plan the SIC code identified in the solicitation may submit offers for the requirement. A participant will be deemed ineligible for award by SBA if it submits an offer for a requirement for which it does not have an approved SIC code.

(3) *Construction competitions.* Where a construction requirement offered to the 8(a) program exceeds the \$3 million competitive threshold, SBA will determine, based on its knowledge of the 8(a) portfolio, whether the competition should be limited only to those Program Participants located within the geographical boundaries of one or more SBA district offices, an entire SBA regional office, or adjacent SBA regional offices. Only those Participants located within the appropriate geographical boundaries are eligible to submit offers.

(4) *Competition for all non-construction requirements.* Except for construction requirements, all eligible Program Participants nationally may submit offers in response to any solicitation for a competitive 8(a) procurement requirement.

(h) *Award to firms whose program terms have expired.* A concern that has completed its term of participation in the 8(a) program, as set forth in § 124.110, may be awarded a competitive 8(a) contract if it was a Program Participant eligible for award of the contract on the date specified for receipt of offers contained in the contract solicitation.

[54 FR 34712, Aug. 21, 1989, as amended at 59 FR 12815, 12816, Mar. 18, 1994; 60 FR 29976, 29977, June 7, 1995]

§ 124.312 Competitive business mix.

(a) *General.* To ensure that 8(a) firms do not develop an unreasonable reliance on 8(a) contracts and to ease the transition of such firms into the competitive marketplace after exiting the 8(a) program, Program Participants must make maximum efforts to obtain business outside the 8(a) program.

(b) *Non-8(a) business activity targets and support levels during developmental stage.* (1) *Attainment of targeted levels.* During the developmental stage of Program Participation, an 8(a) concern must make substantial and sustained efforts to attain the targeted dollar levels of non-8(a) revenue established in its business plan.

(2) *Maintenance of existing business base.* A business concern which enters the 8(a) program must make maximum efforts to maintain its existing business base and use the 8(a) program as a resource to strengthen the firm after its 8(a) certification.

(3) *Marketing strategy to attain targeted levels.* Every Program Participant must engage in a reasonable marketing strategy that will maximize its potential to achieve the targeted levels of non-8(a) revenue established in its business plan.

(4) *Reporting and verification of business activity.* Once admitted to the 8(a) program, a Program Participant must provide annual financial statements to SBA in accord with § 124.501(c). The statements shall segregate revenues as non-8(a) and 8(a) revenue as appropriate.

Also, within 30 days from the end of the program year, the Program Participant shall provide SBA with an annual report of all non-8(a) contracts, options and modifications affecting price executed during the program year.

(c) *Required Non-8(a) Business Activity Targets During Transitional Stage.* (1) *General.* During the transitional stage of the program, the Program Participant shall be required to achieve certain targets of non-8(a) contract revenue. Such targets shall be referred to as non-8(a) business activity targets and shall be expressed as a percentage of total revenue. The targets shall reflect a reasonably consistent increase in non-8(a) revenue. Participants approved for participation on or after November 15, 1988 and Participants with more than five years remaining in the program as of August 15, 1989 shall be subject to the non-8(a) business activity targets set forth in paragraph (c)(2) of this section. Participants with five years or less remaining in the program as of August 15, 1989 shall be subject to the modified non-8(a) business activity targets set forth in paragraph (c)(3) of this section.

(2) *Non-8(a) business activity targets.* Firms approved for program participation on or after the enactment of Pub. L. 100-656 (November 15, 1988) and current Program Participants that have more than five years remaining in the program as of August 15, 1989 shall be subject to the following non-8(a) business activity targets during each year of program participation in the transitional stage:

Program participant's year in the transitional stage	Non-8(a) business activity targets (non-8(a) revenue as a percentage of total revenue)
1	15-25
2	25-35
3	35-45
4	45-55
5	55-75

(3) *Modified non-8(a) business activity targets.* Firms that have five years or less remaining in the program as of August 15, 1989 shall be subject to modified non-8(a) business activity targets during the transitional stage of program participation.

(i) A firm with three to five years remaining in the program as of August 15, 1989 shall be subject to the following non-8(a) business activity targets:

Program participant's year in the transitional stage	Modified non-8(a) business activity targets (non-8(a) revenue as a percentage of total revenue)
1	10–15
2	15–20
3	20–30
4	30–40
5	40–50

(ii) A firm with less than three years remaining in the program as of August 15, 1989 shall make substantial and sustained efforts to attain the targeted dollar levels of non-8(a) sales approved in its business plan.

(4) *Failure to meet required non-8(a) business activity target.* Firms that fail to achieve the minimum percentage non-8(a) business activity target in any year of the transitional stage will be subject to the remedial measures set forth in paragraph (c)(12) of this section. Compliance with the applicable business activity target is measured at the end of any program year in the transitional stage of program participation (e.g., at the end of the first year in the transitional stage of program participation, non-8(a) revenue is compared to total revenue). Remedial measures, if appropriate, will be imposed during the subsequent program year (e.g., non-compliance with the required business activity target in year one of the transitional stage of program participation would cause remedial measures to be imposed in year two in the transitional stage).

(5) *Attainment of targeted levels.* The program participant must make maximum efforts to maintain and increase its targeted level of non-8(a) revenue during the transitional stage.

(6) *Marketing strategy to attain targeted levels.* The program participant must engage in a reasonable marketing strategy that will maximize its potential to achieve the targeted levels of non-8(a) revenue established in the business plan.

(7) *Reporting and verification of business activity.* Program Participants during the transitional stage shall provide annual financial statements to SBA

with a breakdown of 8(a) and non-8(a) revenue in accord with §124.501(c). The Program Participant shall also provide SBA with a report of all non-8(a) contracts, options and modifications affecting price executed during the program year (and any other information as required by SBA) within thirty days from the end of the reporting period. At the end of each year of participation in the transitional stage, the BOS assigned to work with the participant shall review the participant's total revenues to determine whether the participant's non-8(a) revenues have met the targets established pursuant to paragraphs (c)(2) and (c)(3) of this section.

(8) *Certification of compliance.* Before the receipt of any 8(a) contract during the transitional stage of the program, a Program Participant must certify that it is in compliance with the non-8(a) business activity targets established in its business plan as approved by SBA or that it is in compliance with any remedial measures imposed by SBA pursuant to paragraph (c)(9) of this section, if such remedial measures allow the continued award of 8(a) contracts.

(9) *Remedial measures for failure to achieve non-8(a) business activity targets.* SBA is authorized to take appropriate remedial measures with respect to a Program Participant which has failed to attain the minimum required business activity targets as established in paragraphs (c)(2) and (c)(3) of this section. The type of remedial measure used depends in part on the extent to which the Participant failed to obtain and the effort expended in seeking non-8(a) business. These remedial actions include, but are not limited to:

(i) Requiring the Program Participant to obtain management and technical assistance or to obtain counseling and/or attend seminars relating to management assistance, business development, financing, marketing, or proposal preparation.

(ii) Conditioning the award of future sole source 8(a) contracts on the Participant's taking affirmative steps to expand the dollar volume of its competitive business activity, such as changes in marketing of financing strategies;

(iii) Reducing a Participant's approved level of 8(a) support;

(iv) Reducing, or eliminating, sole source 8(a) contracts;

(v) Program termination pursuant to § 124.209—program termination proceedings will be commenced where a firm makes no efforts to obtain non-8(a) revenues.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34903, Aug. 27, 1990; 60 FR 29977, June 7, 1995]

§ 124.313 Certification of SBA's competency.

(a) SBA will certify that it is competent to perform the requirement, as provided by section 8(a)(1)(A) of the Small Business Act, based on its determination that the 8(a) concern with which it intends to subcontract is responsible to perform the requirement. If SBA determines that the concern lacks the capability, competency, capacity, credit, integrity, or tenacity and perseverance to perform on a specific 8(a) subcontract, the subcontract will not be awarded to such concern. A Program Participant which has not submitted required financial statements to SBA will be deemed not responsible to receive 8(a) subcontracts. In addition, SBA will also certify whether an 8(a) concern is eligible under the Walsh-Healey Public Contracts Act, 41 U.S.C. 35(a), for each individual 8(a) subcontract.

(b) SBA's determination not to award a Program Participant a specific 8(a) subcontract because the concern lacks an element of responsibility, or is ineligible under the Walsh-Healey Public Contracts Act, does not constitute a denial of total 8(a) program participation for the purposes of section 8(a)(9) of the Small Business Act.

(c) A Participant that is determined by SBA not to be responsible to perform a sole source or competitive 8(a) contract may not seek the issuance of a Certificate of Competency pursuant to § 125.5 of this title.

§ 124.314 Performance of work by the 8(a) concern.

(a) To assure the accomplishment of the purposes of the 8(a) program, each 8(a) subcontractor must perform work

equivalent to the following percentages:

(1) *Services (except construction).* In the case of an 8(a) contract for professional and/or non-professional services (except construction), at least 50 percent of the cost of contract performance incurred for labor must be expended for employees of the 8(a) concern.

(2) *Supplies (other than procurement from a regular dealer in such supplies).* In the case of an 8(a) contract for supplies, an 8(a) concern that seeks to perform the requirement as a manufacturer must perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials. This requirement does not apply to 8(a) concerns that seek to perform 8(a) supply contracts as regular dealers in such supplies.

(3) *General construction.* In the case of an 8(a) general construction contract, the 8(a) concern must perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

(4) *Construction by special trade contractors.* In the case of an 8(a) contract for special trade construction (e.g., electrical, plumbing, mechanical), the 8(a) concern must perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.

(b) The Program Participant must certify in its bid or proposal that it will perform the required percentage of work with its own employees. Failure of the concern to provide such a statement will result in the firm being considered ineligible for award.

(c) For purposes of determining whether a Program Participant will perform the required percentage of the contract, the work to be performed by a subsidiary(ies) of the Participant or a concern(s) otherwise affiliated with the Participant is not counted as being performed by the Participant.

(d) *Indefinite quantity contracts.* (1) In order to ensure that the required percentage of an indefinite quantity 8(a) award is performed by the Program Participant, at any point in time the Program Participant must have performed the required percentage of the total value of the contract to that

§ 124.315

date. For a service or supply contract, this does not mean that the Program Participant must perform 50% of each task order with its own force. But, rather, the Participant is required to perform 50% of the combined total of all task orders to date. The Regional Administrator or his/her designee may waive this requirement where a large amount of subcontracting is essential in the early stages of performance before the work to be done by the Participant can be performed, provided that there are written assurances from both the Participant and the procuring agency that the contract will ultimately comply with the requirements of this section.

EXAMPLE. If a Program Participant performed 90 percent of a \$100,000 task order on an indefinite quantity service contract with its own work force, it would only have to perform 10 percent of a second task order for \$100,000 because the concern would still have performed 50 percent of the combined total value of the contract to date (\$100,000 out of \$200,000).

(2) Where there is a guaranteed minimum condition in an indefinite quantity 8(a) award, the required performance of work percentage need not be met on the first task order. In such a case, however, the percentage of work to be subcontracted to other concerns by the Program Participant on the first task order may not exceed 50 percent of the total guaranteed minimum dollar value to be provided by the contract. If the first task order exceeds 50 percent of the guaranteed minimum amount, the Participant may subcontract no more than 50 percent of the guaranteed amount. Once the guaranteed minimum amount is met, the general rule for indefinite quantity contracts set forth in paragraph (d)(1) of this section applies.

EXAMPLE. Where a contract guarantees a minimum of \$100,000 in professional services and the first task order is for \$60,000 in such services, it would be acceptable for the Program Participant to perform less than \$30,000 (i.e., 50 percent of \$60,000). The Program Participant could be permitted to perform only \$10,000 of that first task order. In such a case, the entire remainder of the guaranteed minimum (\$40,000), however, would have to be performed by the Program Participant so that the Participant would have ultimately

13 CFR Ch. I (1–1–98 Edition)

performed \$50,000 (i.e., 50% of the \$100,000 guaranteed minimum).

§ 124.315 Fair market price for 8(a) awards.

(a) A “fair market price” for an 8(a) contract shall be determined by the agency offering the procurement requirement to SBA in accordance with paragraphs (a)(1) and (a)(2) of this section.

(1) The estimate of a current fair market price for a new procurement requirement, or a requirement that does not have a satisfactory procurement history, shall be derived from a price or cost analysis. Such analysis may take into account prevailing market conditions, commercial prices for similar products or services, or data obtained from any other agency. Such analysis must also consider any cost or pricing data that is timely submitted by the SBA.

(2) The estimate of a current fair market price for a procurement requirement that has a satisfactory procurement history shall be based on recent award prices adjusted to insure comparability. Such adjustments shall take into account differences in quantities, performance, times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other additional costs which may be deemed appropriate.

(b) Upon the request of SBA, an agency offering a procurement requirement for potential award through the 8(a) program shall submit to SBA a written statement detailing the method used by the agency to estimate the current fair market price for such contract. Such statement shall be submitted within 10 working days. The procuring agency must identify the information, studies, analyses, and other data it used in making its estimate. The procuring agency's estimate of fair market price and any supporting data may not be disclosed to any potential contractor or subcontractor, other than SBA.

(c) The concern selected to perform the 8(a) contract may request SBA to protest the procuring agency's estimate of current fair market price to the Secretary of the Department or

Small Business Administration

§ 124.317

head of the agency in accordance with § 124.320(b).

§ 124.316 Contract administration.

(a) SBA may delegate, by the use of special clauses in the prime contract and subcontract, certain responsibilities for administering an 8(a) subcontract to the procuring agency.

(b) SBA may delegate to the procuring agency all subcontract administration functions except the following: the approval of novation agreements (48 CFR 42.302(a)(25)); and all matters pertaining to advance payments approved by SBA.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34903, Aug. 27, 1990]

§ 124.317 Performance of contracts by original 8(a) concern.

(a) Subject to the provisions of paragraph (b) of this section, a contract (including options) awarded pursuant to section 8(a) of the Small Business Act on or after June 1, 1989 shall be performed by the concern that initially received such contract. If the owner or owners upon whom eligibility was based relinquishes ownership or control of such concern, or enters into any agreement to relinquish such ownership or control, such contract or option shall be terminated for the convenience of the Government. In such a case, repurchase costs or other damages cannot be assessed against the concern due solely to the provisions of this paragraph. This provision applies whether the concern that initially received 8(a) certification remains a separate legal entity after a transfer of ownership or whether the concern merges into or is acquired by another business concern.

(b) The Administrator may, as a matter of discretion and on a nondelegable basis, waive the requirements of paragraph (a) of this section if requested to do so by the original 8(a) awardee if any of the following conditions exist:

(1) When it is necessary for the owner(s) of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing;

(2) Ownership and control of the concern that is performing the contract will pass to another Program Partici-

pant, but only if the acquiring firm would otherwise be eligible to receive the award directly as an 8(a) contract;

(3) The individuals upon whom eligibility was based are no longer able to exercise control of the concern due to incapacity of death; and

(4) When, in order to raise equity capital, it is necessary for the disadvantaged owner(s) of the concern to relinquish ownership of a majority of the voting stock of such concern, but only if—

(i) Such concern has exited the 8(a) program;

(ii) The disadvantaged owner(s) will maintain ownership of the largest single outstanding block of voting stock (including stock held by affiliated parties); and

(iii) The disadvantaged owner(s) will maintain control of the daily business operations of the concern.

(c) Requests pursuant to paragraph (b) of this section must be made prior to the relinquishment of ownership and control except in the case of death or incapacity. A request for a waiver under paragraph (b)(4) of this section must be made as soon as possible after the incapacity or death occurs.

(d) A procuring agency may request a waiver of the requirements of paragraph (a) of this section if the head of the procuring agency certifies that termination of the contract would severely impair attainment of the agency's program objectives or missions.

(e) A concern performing an 8(a) contract must notify the SBA in writing immediately upon entering into an agreement or agreement in principle (either oral or written) to transfer all or part of its stock or other ownership interest or assets to any other party. Such an agreement could include an oral agreement to enter into a transaction to transfer interests in the future.

(f) Denial of a waiver request may be appealed to SBA's Office of Hearings and Appeals in accordance with § 124.210 and part 134 of the title.

(g) For the purposes of determining ownership and control of a concern under these regulations, any potential ownership interests (such as options or warrants) held by investment companies licensed under the Small Business

Investment Act of 1958 shall not be treated as ownership interests until exercised.

(h) An 8(a) concern may not transfer the performance of an 8(a) contract to another concern, absent a waiver or authorized by this section. Such a transfer may be grounds for termination of the concern from the 8(a) program.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34903, Aug. 27, 1990]

§ 124.318 Exercise of options and modifications.

(a) *Unpriced Options.* The exercise of an unpriced option is considered to be a new contracting action. As such, if a concern has exited the 8(a) program or is no longer small under the size standard corresponding to the SIC code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised. If, however, the concern is still a Program Participant and is still a small business under the size standard corresponding to the SIC code for the requirement, negotiations to price the option may be entered into provided the estimated fair market price falls below the applicable threshold amount set forth in § 124.311 and, if a fair and reasonable price is negotiated, and it is otherwise consistent with program requirements, the option may be exercised. If the estimated fair market price exceeds the applicable threshold amount set forth in § 124.311, the requirement must be competed among eligible 8(a) concerns. Because this equates to a new contracting action, SBA's concurrence in the exercise of such options is required.

(b) *Priced Options.* A priced option to an 8(a) contract award may be exercised whether the concern that received the award has exited the 8(a) program and whether the concern is no longer small under the size standard corresponding to the SIC Code for the requirement, if to do so is in the best interests of the Government considering the purposes of the 8(a) program.

(c) *Modifications Beyond the Scope.* A modification beyond the scope of the initial 8(a) contract award is considered to be a new contracting action. As such, if a concern has exited the 8(a) program or is no longer small under

the size standard corresponding to the SIC Code for the requirement, the modification cannot be exercised. If, however, the concern is still a Program Participant and is still a small business under the size standard corresponding to the SIC Code for the requirement, the modification may be made provided the estimated fair market price falls below the applicable threshold amount set forth in § 124.311 and other program requirements are met, since the authority exists to enter into a new 8(a) contract to fulfill the requirement. If the estimated fair market price exceeds the applicable threshold amount set forth in § 124.311, the requirement must be competed among eligible 8(a) concerns. Because this equates to a new contracting action, SBA's concurrence in the exercise of such modifications is required.

(d) *Modifications Within the Scope.* A modification within the scope of the initial 8(a) contract award may be exercised whether the concern that received the award has exited the 8(a) program and whether the concern is no longer small under the size standard corresponding to the SIC Code for the requirement.

[54 FR 34712, Aug. 21, 1989; 54 FR 43217, Oct. 23, 1989]

§ 124.319 Contract termination.

(a) *Termination for default.* A decision to terminate a specific 8(a) contract for default is made by the procuring agency contracting officer in cooperation with SBA. The contracting officer will advise SBA in writing in advance of his/her intent to terminate the 8(a) contract for default. SBA may provide to the 8(a) concern any program benefits reasonably available in order to assist in preventing termination for default of the contract. SBA will advise the contracting officer of this effort. If, despite the efforts of the SBA, the procuring agency contracting officer believes grounds for termination continue to exist, he/she may terminate the 8(a) contract for default, after consulting with SBA. Such terminations shall be processed in accordance with the FAR, 48 CFR. SBA will have no liability for termination costs or reprocurement costs.

(b) *Termination for convenience.* (1) In cooperation with SBA, the procuring agency contracting officer may terminate an 8(a) contract for convenience any time it is determined to be in the best interest of the government to do so.

(2) Pursuant to §124.317, a contract shall be terminated for convenience if the owner or owners upon whom eligibility was based relinquish ownership or control of such concern, or enter into any agreement to relinquish such ownership or control, unless a waiver is granted pursuant to §124.317. Such terminations shall be processed in accordance with the FAR, 48 CFR.

§ 124.320 Disputes and appeals.

(a) *Contract disputes generally.* (1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, for purposes of the Disputes Clause of a specific 8(a) contract, the contracting officer is that of the procuring agency. A dispute arising between an 8(a) subcontractor and the procuring agency contracting officer will be decided unilaterally by the procuring agency contracting officer.

(2) For disputes arising out of advance payments or business development expense funds, the contracting officer is that of SBA.

(3) For disputes arising out of construction contracts where SBA has waived bonding pursuant to §124.305, the appropriate contracting officer depends upon the dispute. Where the dispute arises out of the disbursement of funds from the special bank account established to protect persons furnishing materials or labor to the 8(a) concern, the SBA contracting officer shall decide the dispute. In all other disputes, including disputes arising out of the performance of the contract, the procuring agency contracting officer shall decide the dispute.

(4) Decisions by contracting officers (either of SBA or a procuring agency) may be appealed as provided by the Contract Disputes Act of 1978.

(b) *SBA appeals of nonselection or terms and conditions.* (1) The Administrator of SBA may appeal the following matters to the head of the procuring agency:

(i) The decision not to make a particular procurement requirement available for award under the 8(a) program; or

(ii) The terms and conditions of a particular contract to be awarded under the 8(a) program, including selection of an appropriate SIC code.

(2) The SBA must notify the contracting officer of the Administrator's intent to appeal an adverse determination within 5 working days of the SBA's receipt of such determination. The SBA Administrator must file a written request to reconsider the adverse decision with the head of the procuring agency (appeal) within 15 working days of the SBA's notification of intent to appeal.

(3) Upon receipt of the notice of intent to appeal, the procuring agency shall suspend further action regarding the procurement until the head of the procuring agency issues a written decision on the appeal, unless the head of the procuring agency makes a written determination that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for a reconsideration of the adverse decision.

(4) If the Administrator's appeal is denied, the procuring agency head shall so notify the SBA, specifying the reasons for the denial. This information shall be made a part of the contract file for the requirement.

(c) An 8(a) Participant selected by the SBA to perform or negotiate an 8(a) contract may request the SBA to protest the procuring agency's estimate of the fair market price for such contract pursuant to paragraph (b) of this section.

§ 124.321 Joint venture agreements.

(a) *Prerequisites for joint venture agreement.* If approved by the AA/MSB&COD or his/her designee, an 8(a) concern may enter into a joint venture agreement, as defined in §124.100, with another small business concern, whether or not an 8(a) participant, for the purpose of performing a specific 8(a) contract. A joint venture agreement is permissible only when the 8(a) concern lacks the necessary capacity to perform the contract on its own, and when the agreement is fair and equitable and

will be of substantial benefit to the 8(a) concern.

(b) *Size limitations.* Except for certain Program Participants owned and controlled by Indian tribes, an 8(a) concern entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the 8(a) subcontract. As such, the annual receipts or employees of the other concern are included in determining the size of the selected 8(a) concern. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the SIC code industry designated for the contract. *See* paragraph (h) of this section for joint ventures controlled by tribally-owned concerns.

(c) *Contents of joint venture agreements.* The following provisions shall be included in all joint venture agreements:

(1) A provision setting forth the purpose of the joint venture.

(2) A provision designating the parties to the joint venture as co-managers.

(3) A provision stating that not less than 51 percent of the net profits earned by the joint venture shall be distributed to the 8(a) concern.

(4) A provision providing for the establishment and administration of a special bank account in the name of the joint venture. This account shall require the signature of all participants to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an 8(a) subcontract shall be deposited in the special account from which all expenses incurred under the subcontract shall be paid.

(5) An itemized description of all major equipment, facilities, and other resources to be furnished by each participant to the joint venture, with a detailed schedule of cost or value of each.

(6) A provision specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the 8(a) contract and any subcontracts to the joint venture.

(d) *Other requirements.* Joint venture agreements are subject to the following additional requirements:

(1) The joint venture agreement must be approved in advance of contract award by the AA/MSB&COD or his/her designee.

(2) An employee of the 8(a) concern must be the designated project manager responsible for contract performance.

(3) Accounting and other administrative records relating to the joint venture shall be kept in the office of the 8(a) concern, unless approval to keep them elsewhere is granted by the Regional Administrator or his/her designee upon written request. Upon completion of the contract performed by the joint venture, the final original records shall be retained by the 8(a) concern.

(4) Quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) shall be submitted to SBA not later than 45 days after each operating quarter of the joint venture.

(5) A project-end profit and loss statement shall be submitted no later than 90 days after completion of the contract including a statement of final profit distribution.

(e) *Obligation of performance.* All parties to the joint venture must sign such documents as are necessary to obligate themselves to ensure performance of the 8(a) contract.

(f) *Performance of work by 8(a) concern(s).* The 8(a) partner(s) to an eligible joint venture, and not the aggregate of all parties to the joint venture, must perform the applicable percentages of work required by §124.314.

(g) *Inspection of records.* The SBA shall have the right to inspect the records of the joint venture without notice at any time deemed necessary.

(h) *Joint ventures with concerns owned by Indian tribes—*(1) *Exemption from size limitations.* The size limitations set forth in paragraph (b) of this section will not be applied to joint ventures entered into by an 8(a) concern owned and controlled by an economically disadvantaged Indian tribe, as defined in §124.100, if the concern:

Small Business Administration

§ 124.401

(i) Owns and controls 51 percent or more of the joint venture;

(ii) Is located on the reservation or land owned by the tribe;

(iii) Performs most of its activities on such reservation or tribally owned land; and

(iv) Employs members of such tribe for at least 50 percent of its total workforce.

(2) *Limitations.* A tribally owned 8(a) concern as a party to a joint venture may receive the exemption set forth in paragraph (h) of this section on no more than five contracts.

(3) *Sunset.* This paragraph shall cease to be effective after September 30, 1994.

(i) *Joint ventures for Small Disadvantaged Business Set-Asides and Small Disadvantaged Business Evaluation Preferences.* Joint ventures are permitted for Small Disadvantaged Business (SDB) set-asides and SDB evaluation preferences, provided that the requirements set forth in this paragraph are met.

(1) For purposes of this paragraph, the term joint venture has the same meaning as that set forth in §121.401(l) of this chapter. Two or more concerns that form an ongoing relationship to conduct business would not be considered "joint venturers" within the meaning of this paragraph, and would also not be eligible as an entity owned and controlled by one or more socially and economically disadvantaged individuals.

(2) A concern that is owned and controlled by one or more socially and economically disadvantaged individuals entering into a joint venture agreement with one or more other business concerns is considered to be affiliated for size purposes with such other concern(s). The combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the SIC code designated for the contract.

(3) The majority of the venture's earnings must accrue directly to the socially and economically disadvantaged individuals in the SDB concern(s) in the joint venture.

(4) The percentage ownership involvement in a joint venture by disadvan-

taged individuals must be at least 51 percent.

Example 1. Small business concern A is 100% owned by disadvantaged individuals. Small business concern B is 100% owned by nondisadvantaged individuals. The percentage involvement by concern A in a joint venture between A and B must be at least 51%.

Example 2. Small business concern C is 51% owned by disadvantaged individuals. Small business concern D is 100% owned by nondisadvantaged individuals. Any joint venture between C and D would be ineligible because the amount of ownership involvement in such a joint venture by disadvantaged individuals would be less than 51%. Even a 90% involvement by concern C in a joint venture with D would mean an overall ownership involvement by disadvantaged individuals of only 45.9% (51% of 90), and an overall ownership involvement by nondisadvantaged individuals of 54.1% (10+ (49% of 90)).

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 33896, Aug. 20, 1990; 55 FR 34903, Aug. 27, 1990; 59 FR 12816, Mar. 18, 1994; 60 FR 29977, June 7, 1995]

§ 124.401 Advance payments.

(a) *General.* (1) Advance payments are disbursements of cash made by SBA to an 8(a) concern prior to the completion of performance of a specific 8(a) subcontract and are based on anticipated performance on the part of the 8(a) concern under a particular 8(a) subcontract. Advance payments are made for the purpose of assisting the 8(a) concern to meet financial requirements pertinent to the performance of an 8(a) subcontract. Advance payments will be considered only after all other forms of financing have been considered by SBA and are determined to be either unavailable or unacceptable to support performance of the 8(a) subcontract.

(2) Advance payments may be authorized only for concerns which are current Program Participants at the time of the approval of the advance payment. A firm which has graduated from or otherwise exited the 8(a) program prior to approval is ineligible for advance payments. Where the concern will graduate from the 8(a) program during the initial performance period (base year), advance payments may be authorized only for that year, and may not be authorized for option years.

(3) Advance payments will be authorized only in connection with sole

source 8(a) awards and not in connection with competitive 8(a) awards.

(4) The gross amount of advance payments will be determined by SBA at the time the request for such payments is approved. The gross amount of advance payments must be determined by SBA prior to commencement of performance of the contract, where possible. In no event shall the total amount of advance payments disbursed and not repaid exceed 90 percent of the outstanding unpaid proceeds of the 8(a) subcontract to which the advance payments relate. The value of unexercised options is not considered in determining the outstanding unpaid proceeds of the 8(a) subcontract. In the case of requirements and indefinite quantity type contracts, advance payments will be authorized only when a guaranteed minimum value is established in the 8(a) subcontract, and the amount of advance payments approved shall not exceed 90 percent of that guaranteed minimum. SBA must approve in writing any subsequent change in the gross amount of advance payments.

(5) All advance payments, whether disbursed by letter of credit or otherwise, and all 8(a) subcontract proceeds shall be deposited into a Special Bank Account established exclusively for that purpose pursuant to the Advance Payment clause of the 8(a) subcontract. Under no circumstances may advance payment funds be deposited in certificates of deposit or other securities. The procuring agency shall pay all 8(a) subcontract proceeds directly into the Special Bank Account until notified by SBA in writing that the advance payments have been fully liquidated. SBA will not authorize any withdrawals from the Special Bank Account that are inconsistent with the disbursement schedule established by the 8(a) subcontract under which the advance payments were made.

(6) Advance payments shall be liquidated from proceeds derived from the performance of the specific 8(a) subcontract to which they pertain or from other revenues of the business (except other advance payments). 8(a) subcontract proceeds shall be applied first to liquidate outstanding advance payments. Repayment must occur according to the liquidation schedule estab-

lished by the 8(a) subcontract under which the advance payments were made.

(7) The special bank account may not be used as a revolving line of credit. The cumulative total amount of advance payments disbursed may not exceed the amount authorized by the Regional Administrator or the ARA/MSB&COD.

(b) *Requirements and conditions.* (1) Advance payments may be approved for an 8(a) concern only when all of the following conditions are found by SBA to exist:

(i) An 8(a) concern does not have adequate working capital to perform a specific 8(a) subcontract.

(ii) Adequate and timely private financing is not available on reasonable terms to provide necessary capital.

(iii) Progress payments based on costs at customary rates will not satisfy the working capital requirements of the 8(a) concern to perform the 8(a) subcontract.

(iv) When applicable, loan guarantees for defense production are not available.

(v) Progress payments based on costs with unusual terms will not satisfy the working capital requirements of the 8(a) concern to perform the 8(a) subcontract.

(vi) The 8(a) concern has established or agrees to establish and maintain financial records and controls which will provide for complete accountability and required reporting of advance payment funds. These records must be made available upon request for review and copying by SBA and other appropriate Federal officials.

(vii) The 8(a) concern has no unliquidated advance payments outstanding on another 8(a) subcontract which is completed, terminated or in default, unless such unliquidated advance payments are due only to the contracting agency's delay in making final payment to the 8(a) concern after it has successfully completed the 8(a) subcontract.

(2) Advance payments shall not be made to an 8(a) concern in any case in which the concern has assigned its right to receive any payment under the specific 8(a) subcontract to any person or entity.

(3) SBA shall not charge interest on advance payments disbursed pursuant to these regulations, except upon an event of default, as defined in the subcontract. When charged, interest shall be assessed at such rate as established by the Secretary of the Treasury pursuant to Pub. L. 92-41.

(4) Under no circumstances may a liquidation schedule be waived. However, the cognizant Regional Administrator or ARA/MSB&COD may authorize a modified liquidation schedule in appropriate cases. Such modified schedule becomes effective when contained in an appropriate modification to the subcontract.

(c) *Application and approval procedure.* The following procedures apply to the approval of advance payments:

(1) The 8(a) concern must submit a written request for advance payments to the cognizant SBA Regional Administrator or the ARA/MSB&COD. Such request must include such detailed documentation as SBA may specify to support 8(a) concern's need for such funds and proof that working capital financing cannot be found from financing institutions at reasonable terms.

(2) The 8(a) concern must identify a commercial bank which is a member of the Federal Reserve System in which it will establish a Special Bank Account for the deposit of advance payments and all payments made to it by the procuring agency for its performance of the 8(a) subcontract. This special account shall be a non-interest bearing demand deposit account.

(3) The 8(a) concern must, as required by IRS regulations, select a Federal Depository into which the Federal withholding and FICA payment will be made.

(4) Upon review of all of the circumstances, the Regional Administrator or the ARA/MSB&COD shall decide whether to approve or deny a request for advance payments, and, if approval is granted, shall designate the amount thereof and the terms and conditions upon which such advance payments may be made.

(d) *Post-approval procedures.* The Contracting Officer shall be responsible for assuring that advance payments are implemented consistent with the Finding, Determination and Authorization

for Advance Payments issued by the Regional Administrator or the ARA/MSB&COD. Before any advance payments are disbursed, the following actions must occur:

(1) The 8(a) concern must execute a note evidencing the full amount of the advance payments and any other documents needed to create and perfect such other sources of security as SBA shall require, including, but not limited to the following:

(i) Real estate, deeds of trust and mortgages;

(ii) Security agreements and financing statements; and

(iii) Personal guarantees.

(2)(i) The 8(a) concern and SBA shall execute a modification to the 8(a) subcontract adding an Advance Payment clause prior to the disbursement of any advance payments. The clause shall state the amount of the advance payments, a liquidation schedule and all other terms and conditions to govern the advance payments, consistent with the Finding, Determination and Authorization for Advance Payments issued by the Regional Administrator or ARA/MSB&COD.

(ii) The Contracting Officer, when other contract terms reducing the quantity, price or term of performance of the 8(a) prime and subcontract are modified by the procuring agency, shall initiate action to modify the Advance Payment clause and, if appropriate, the letter of credit as necessary, including but not limited to reduction of the total amount of advance payments authorized or the amount of the letter of credit and/or restructuring the liquidation schedule, to ensure that at no time during the performance of the 8(a) subcontract does the unliquidated advance payments exceed 90 percent of the unpaid value of the 8(a) subcontract.

(3) The 8(a) concern, SBA and the bank in which the Special Bank Account has been established will enter into a Special Bank Account Agreement prior to disbursement of any funds. The agreement shall specify the respective rights and responsibilities of the parties. The Agreement shall grant

to SBA the unilateral right to withdraw any funds in the Special Bank Account to the extent necessary to liquidate any unliquidated advance payments.

(i) The cognizant SBA Regional Administrator or the ARA/MSB&COD shall designate at least two SBA employees to serve as countersignatories on the Special Bank Account. Withdrawals from the account will be made only upon the authorized signatures of a representative of the 8(a) concern and one of the designated SBA employees, as identified on the signature card for the Special Bank Account. Under no circumstances shall the requirement for an SBA employee countersignature be waived.

(ii) At the time that SBA disburses advance payment funds into the Special Bank Account, SBA shall obtain a paramount lien upon the Special Bank Account, any property contracted for, supplies, material and other property acquired with the advance payment funds, and the most superior lien possible upon any other security required by the Finding, Determination and Authorization for Advance Payments.

(4) Prior to disbursement of an advance payment, SBA shall modify the prime contract with the procuring agency in the following respects:

(i) Reassign contract administration authority to the extent necessary to administer the Advance Payment clause of the 8(a) subcontract to SBA's Contracting Officer.

(ii) Direct payment of all contract proceeds into the Special Bank Account until SBA issues written notice that the advance payments have been fully liquidated.

(iii) Require prompt notice of any adverse developments in contract performance, changes in the Government requirement, or of any other condition that may affect contract payments.

(iv) Require that copies of all payment vouchers issued by the procuring agency's disbursing office be sent to the Contracting Officer.

(e) *Procedures for use of Advance Payment funds.* (1) Except for repayment to SBA in appropriate circumstances, advance payment funds may be used by an 8(a) concern only for the purchase of materials, payment of labor, payment

for equipment expenses, general and administrative expenses and overhead, and payments to the subcontractors of the 8(a) concern necessary for the performance of the specific 8(a) subcontract for which the advance payments were authorized. Program Participants shall follow a two-step process to gain access to advance payment funds. The first step is the disbursement of the advance payment funds from SBA, either directly or by way of letter of credit into the Special Bank Account. The second step is the withdrawal of funds from the Special Bank Account by check to pay particular contract expenses.

(2) *Disbursement of advance payment funds by SBA.* (i) SBA shall disburse advance payments through a letter of credit where the Agency anticipates that all of the following conditions exist:

(A) Its relationship with the particular 8(a) concern will last for a year or more.

(B) The cumulative disbursements to that 8(a) concern will total at least \$120,000 annually.

(C) The 8(a) concern has submitted a schedule of its projected monthly advance requirements for 8(a) subcontract disbursements and SBA has reviewed it and found it to be reasonable.

(D) The 8(a) concern has established or agrees to establish and maintain financial records and controls which will provide for complete accountability and required reporting of program funds. These records must be made available upon request for review and audit by SBA and the General Accounting Office.

(ii) *Procedures for disbursements by letter of credit.* The procedures for the utilization of the letter of credit method of payment shall be in accord with 48 CFR 32.406. Where disbursement is by the letter of credit method, 8(a) concerns shall draw down funds against their letters of credit for deposit into the Special Bank Account only as needed and in such amounts necessary for its immediate cash needs under the 8(a) subcontract for which the advance payments were authorized. Such immediate cash needs shall be documented by the 8(a) concern and verified by SBA

prior to draw down. The amount of each draw down against the letter of credit shall be for the minimum amount needed to satisfy immediate cash needs, taking into account other financial resources available to the 8(a) concern, including progress payments not required for the liquidation of disbursed advance payments.

(iii) In all instances not covered by paragraph (e)(2)(i) of this section, SBA shall disburse advance payments by Treasury check or electronic funds transfer. In such cases, the Contracting Officer shall request SBA's Office of Financial Operations, Denver, Colorado, to disburse the authorized amount of the advance payments into the Special Bank Account.

(3) *Procedures for withdrawal of funds from the Special Bank Account.* All payments to the 8(a) concern under the 8(a) subcontract for which advance payments were authorized, together with all disbursements of such advance payments, shall be paid into the Special Bank Account.

(i) *Liquidation of disbursed advance payments.* The funds in the Special Bank Account shall be applied by SBA first to liquidate the balance of disbursed advance payments, in accordance with the liquidation schedule in the Advance Payment clause of the 8(a) subcontract. Withdrawals for liquidation of disbursed advance payments shall be made in accordance with the procedures contained in the Advance Payment clause of the 8(a) subcontract.

(ii) *Payment of 8(a) subcontract expenses.* Any amounts in the Special Bank Account not required to liquidate disbursed advance payments shall next be applied to pay allowable and allocable costs incurred in the performance of the 8(a) subcontract for which the advance payments were authorized. To obtain withdrawals from the Special Bank Account for the payment of such costs, the 8(a) concern shall request issuance of checks for the payment of expenses to the Contracting Officer, supported by the documentation described below. Such requests shall be made sufficiently in advance of the due date for such obligations to permit the review of the request by SBA and countersignature by the designated

SBA countersignatories. The 8(a) concern shall support each request for a withdrawal from the Special Bank Account by submitting to the Contracting Officer or his/her designee, to the extent applicable, the following:

(A) The original vendor invoice or original payroll record;

(B) A certified statement, dated and signed by the concern's authorized certifying official, attesting to the truth and accuracy of the vendor invoice, and/or the payroll records for the requested withdrawal, including records of direct payroll expenditures as well as labor overhead;

(C) A certification by the 8(a) concern that all Federal taxes and FICA payments are current, or a copy of any agreement with the Internal Revenue Service (IRS) providing for payment of delinquent taxes; and

(D) Documentation of overhead and general and administrative rates, using projected indirect costs applied to a valid base, which have been properly allocated to direct material, labor, or other direct costs.

(E) Where the requested withdrawal is for payroll expenses, the 8(a) concern must prepare a check for Federal taxes in the name of the tax collecting agency, or the Federal Depository selected by the 8(a) concern into which its Federal withholding and FICA payments are made, to be signed by SBA and the 8(a) concern concurrent with the check for the submitted payroll. If the amount of a check payable to IRS or to the Federal Depository is less than 25 percent of the gross payroll for the period, the 8(a) concern's authorized certifying official shall prepare a statement certifying that the amount designated as payable to IRS or to the Federal Depository is true and correct. There shall be no change of Federal Depository without obtaining the prior written consent of SBA.

(iii) *Release of residual funds after liquidation of the advance payments and payment of 8(a) subcontract expenses.* Any funds remaining in the Special Bank Account after the 8(a) subcontract has been successfully completed or terminated and after the advance payments have been fully liquidated and all allowable and allocable 8(a) subcontract performance costs

have been paid shall be disbursed to the 8(a) concern. Upon receipt of the final progress payment, the Contracting Officer shall expeditiously close the Special Bank Account, executing a check withdrawing the remaining balance of the Account payable to the 8(a) concern.

(f) *Cancellation.* (1) SBA may determine that advance payments should be cancelled under appropriate circumstances, including but not limited to the following:

(i) The terms and conditions of the Advance Payment clause have not been adhered to by an 8(a) concern.

(ii) The 8(a) concern is not in compliance with its 8(a) Participation Agreement.

(iii) The 8(a) concern has been suspended pursuant to § 124.211 or has been terminated by administrative action under section 8(a)(9) of the Small Business Act, 15 U.S.C. 637(a)(9).

(2) In the event of cancellation of advance payments to an 8(a) concern, all previous advance payments made to that 8(a) concern shall become due and payable to SBA prior to the receipt of final contract payment.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 34903, Aug. 27, 1990]

§ 124.402 Business development expense.

(a) Any Business Development Expense (BDE) funds received by a Program Participant prior to the expiration of the BDE program must be used exclusively for the purposes stated in the BDE approval. Use of such funds for any other purpose may be good cause for termination from the 8(a) program pursuant to § 124.209.

(b) Any Program Participant which received BDE funds prior to the expiration of the BDE program shall maintain records to substantiate the uses for which the BDE funds have been expended.

(c) In the event of default on an 8(a) contract to which BDE funds relate, the Participant shall be liable for repayment of the full amount of the BDE to SBA.

§ 124.403 Development Assistance Program.

(a) *General.* Section 7(j)(1) of the Small Business Act provides for financial assistance to public or private organizations to pay all or part of the cost of projects designed to provide technical or management assistance to individual or enterprises eligible for assistance under sections 7(a)(11), 7(j)(10) and 8(a) of the Small Business Act. The AA/MSB&COD is responsible for coordinating and formulating policies relating to the dissemination of this assistance to small business concerns eligible for assistance under sections 7(a)(11), 7(j)(10) and 8(a) of the Small Business Act.

(b) *Services.* (1) Section 7(j)(1–2) of the Small Business Act empowers the SBA to provide through public and private organizations the management and technical assistance enumerated in paragraph (b)(3) of this section to those individuals or concerns who meet the eligibility criteria contained in sections 7(a)(1) and 8(a) of the Small Business Act.

(2) The SBA shall give preference to projects which promote the ownership, participation in ownership, or management of small businesses owned by low-income individuals and small businesses eligible to participate in the section 8(a) program.

(3) This assistance may include any or all of the following:

(i) Planning and research, including feasibility studies and market research;

(ii) The identification and development of new business opportunities;

(iii) The furnishing of centralized services with regard to public services and Federal Government programs including programs authorized under sections 7(a)(11), 7(j)(10) and 8(a) of the Small Business Act.

(iv) The establishment and strengthening of business service agencies, including trade associations and cooperatives;

(v) The furnishing of business counseling, management training, with special emphasis on the development of management training programs using the resources of the business community, including the development of management training opportunities in

existing business, and with emphasis in all cases upon providing management training of sufficient scope and duration to develop entrepreneurial and managerial self-sufficiency on the part of the individuals served.

(4) Sections 7(j)(3) and 7(j)(9) of the Small Business Act authorize SBA to:

(i) Encourage the placement of subcontracts with small business concerns located in areas of high concentration of unemployed or low-income individuals, with small businesses owned by low-income individuals, and with small businesses eligible to receive contracts pursuant to section 8(a) of the Act. SBA may provide incentives and assistance to such business that will aid in the training and upgrading of potential subcontractors or other small business concerns eligible for assistance under sections 7(a)(11), 7(j), and 8(a) of the Small Business Act.

(ii) Coordinate and cooperate with the heads of other Federal departments and agencies, to insure that contracts, subcontracts, and deposits made by the Federal Government or with programs aided with Federal funds are placed in such a way as to further the purposes of sections 7(a)(11), 7(j) and 8(a) of the Small Business Act.

(c) *Eligibility.* (1) Eligibility for the assistance enumerated under paragraph (b) of this section above shall include, but not limited to:

(i) Businesses which qualify as small within the meaning of size standards prescribed in 13 CFR part 121, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and

(ii) Businesses eligible to receive contracts pursuant to section 8(a) of the Small Business Act.

(d) *Delivery of services.* (1) The financial assistance authorized for projects under paragraph (b) of this section includes assistance advanced by grant, cooperative agreement, or contract.

(2) To the extent feasible, services available under paragraph (b) of this section shall be provided in a location which is easily accessible to the individuals and small business concerns served.

(e) *Coordination and cooperation with other government agencies.* (1) The AA/MSB&COD may utilize the resources of other agencies and departments whenever practicable which can directly or indirectly support or augment the purposes of sections 7(a)(11), 7(j) and 8(a) of the Small Business Act.

(2) The AA/MSB&COD shall enter into agreements with Federal agencies and departments to further the objectives of sections 7(a)(11), 7(j) and 8(a) of the Small Business Act.

(3) The AA/MSB&COD shall encourage the placement of deposits made by the Federal Government, or by programs aided with Federal Funds, in such a way as to further the purposes of section 7(a)(11), 7(j) and 8(a) of the Small Business Act.

§ 124.404 Small Business and Capital Ownership Development Program.

Section 7(j)(10) of the Small Business Act establishes a Small Business and Capital Ownership Development program which shall provide additional assistance exclusively for small business concerns eligible to receive contracts pursuant to section 8(a) of Small Business Act. The management of the Capital Ownership Development program is vested in the AA/MSB&COD who is responsible for the oversight of the program and activities set forth in this part of these regulations. The development assistance described below shall be provided exclusively to those small business concerns eligible to receive contracts pursuant to section 8(a) of the Small Business Act. Such small business concerns shall be participants in the Small Business Capital Ownership Development program. This program shall:

(a) Assist small business concerns participating in the program to develop comprehensive business plans with specific business targets, objectives, and goals;

(b) Provide for such other non-financial services as deemed necessary for the establishment, preservation, and growth of small business concerns participating in the program, including but not limited to:

(1) Loan packaging,

(2) Financial counseling,

(3) Accounting and Bookkeeping assistance,

(4) Marketing assistance, and

(5) Management assistance.

(c) Assist small business concerns participating in the program to obtain equity and debt financing;

(d) Establish regular performance monitoring and reporting systems for small business concerns participating in the program to assure compliance with their business plans;

(e) Analyze and report the causes of success and failure of small business concerns participating in the program; and

(f) Provide assistance necessary to help small business concerns participating in the program to procure surety bonds. Such assistance shall include, but not be limited to:

(1) The preparation of surety bond participating forms;

(2) Special management and technical assistance designed to meet the specific needs of small business concerns participating in the program and which have received or are applying to receive a surety bond, and

(3) Preparation of all forms necessary to receive a surety bond guarantee from the SBA pursuant to Title IV, part B of the Small Business Investment Act of 1958.

§ 124.501 Miscellaneous reporting requirements.

(a) *Capability statements.* Each 8(a) concern shall annually prepare and submit to the SBA a capability statement. Such statement shall briefly describe the concern's various contract performance capabilities and shall contain the name and telephone number of the BOS assigned to the concern. SBA will submit the capability statements to appropriate procuring agencies for the purpose of matching requirements with 8(a) concerns.

(b) *Participant reports on parties assisting it and fees.* (1) Each 8(a) Program Participant shall submit semi-annually a written report to its assigned BOS to include the following information:

(i) A listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to

assist such participant in obtaining a Federal contract;

(ii) The amount of compensation received by any person listed under paragraph (b)(1)(i) of this section during the relevant reporting period along with a description of the activities performed for such compensation.

(2) The BOS will review the report and forward it to the AA/MSB&COD. Any report that raises a suspicion of improper activity shall be referred immediately to the SBA Inspector General.

(3) The failure to submit a report pursuant to the requirements of this section shall be considered good cause for the initiation of a termination proceeding pursuant to § 124.209.

(c) *Submission of financial statements.*

(1) Program Participants with actual gross annual receipts of \$5,000,000 or more must submit to SBA audited annual financial statements prepared by a licensed independent public accountant (as defined in part 107, appendix I, paragraph II. B) within 120 days after the close of the concern's fiscal year.

(i) Upon request by the Program Participant, SBA may waive the requirement for audited financial statements. Waivers under this paragraph may be granted by the appropriate District Director only for the first year that audited financial statements are required. Beyond such first year, only the AA/MSB&COD may waive this requirement for good cause shown by the Program Participant.

(ii) Circumstances where waivers of audited financial statements may be granted include, but are not limited to, the following:

(A) The concern has an unexpected increase in sales towards the end of its fiscal year that creates an unforeseen requirement for audited statements;

(B) The concern unexpectedly experiences severe financial difficulties which would make the cost of audited financial statements a particular burden; and

(C) The concern has been an 8(a) Program Participant less than 12 months.

(2) Program Participants with actual gross annual receipts of \$1,000,000 to \$4,999,999 shall submit to SBA reviewed annual financial statements prepared

Small Business Administration

§ 124.601

by a licensed independent public accountant (as defined in part 107, appendix I, paragraph II. B) within 90 days after the close of the concern's fiscal year.

(3) Program Participants with actual gross annual receipts of less than \$1,000,000 shall submit to SBA an annual statement prepared in-house or a compilation statement prepared by a licensed independent public accountant (as defined in part 107, appendix I, paragraph II. B), verified as to accuracy by an authorized officer, partner, or sole proprietor of the 8(a) concern, by signature and date, within 90 days after the close of the concern's fiscal year.

(4) Any audited financial statements submitted to SBA pursuant to § 124.501(c) shall be prepared in accordance with Generally Accepted Accounting Principles and reflect the independent public accountant's opinion.

(5) While financial statements need not be submitted until 90 or 120 days after the close of an 8(a) concern's fiscal year, depending on the receipts of the concern, a concern seeking to be awarded an 8(a) contract between the close of its fiscal year and such 90 or 120-day time period must submit a final sales report signed by the CEO or President to SBA in order for SBA to determine/verify the concern's size and its compliance with competitive business mix targets. This report must show a breakdown of 8(a) and non-8(a) sales.

(6) Notwithstanding a concern's gross annual receipts, audited or reviewed annual and/or quarterly statements may be required whenever SBA determines it is necessary to obtain a more thorough verification of a concern's assets, liabilities, income and/or expenses, or to determine the concern's capacity to perform a specific 8(a) contract.

(d) *Reporting requirements after exiting the 8(a) program.* Former 8(a) Program Participants shall provide such information as SBA may request concerning such former Participant's continued business operations, contract portfolio and financial condition for a period of three years following the date on which the concern exits the program. Failure to provide such information when requested may result in the nonexercise

of options on contracts awarded through the 8(a) program.

[54 FR 34712, Aug. 21, 1989, as amended at 60 FR 29977, June 7, 1995]

Subpart B—Disadvantaged Business Status Protest and Appeal Procedures

SOURCE: 54 FR 10272, Mar. 13, 1989, unless otherwise noted.

§ 124.601 Introduction.

(a) This subpart sets forth the procedures to be used whenever the SBA is asked to make a determination as to whether a particular concern is "disadvantaged" for purposes of Department of Defense's (DoD's) Small Disadvantaged Business (SDB) set-aside contracts and SDB evaluation preferences, authorized by section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, SBA's section 8(d) subcontracting program, and any other Federal procurement program requiring SBA to determine social and economic disadvantage as a condition for eligibility. These procedures are separate and distinct from those governing size protests and appeals.

(b) In determining the disadvantaged status of a protested concern, the SBA shall utilize the definitions of social and economic disadvantage and other eligibility requirements established in subpart A of part 124 of this title, including the requirements placed on ownership and control. In addition, for purposes of SDB set-asides and SDB evaluation preferences only, there is the additional requirement that the majority of the earnings of the concern directly accrue to the disadvantaged individual who owns and controls it. SBA shall apply these definitions in accordance with the presumption contained in section 8(d) of the Small Business Act (15 U.S.C. 636(d)).

(c) All protests relating to whether a concern is a "small" business for purposes of any Federal program requiring such a condition for eligibility, including SDB set-asides and SDB evaluation preferences, are to be filed pursuant to the procedures set forth in §§ 121.1601–121.1608 of these regulations. The rules

contained in part 121 apply to all such size determinations. For purposes of SDB set-asides, SDB evaluation preferences and the section 8(a) sub-contracting program, the size standard contained in the solicitation is the applicable size standard for the requirement. An appeal of such a size determination may be made pursuant to § 121.11 of these regulations.

[54 FR 10272, Mar. 13, 1989, as amended at 59 FR 12816, Mar. 18, 1994]

§ 124.602 General definitions.

(a) *Annual Review.* SBA's annual review and evaluation of financial statements, eligibility certifications submitted by the 8(a) concern, and such other submissions as may be required of Program Participants to ascertain continued eligibility of a concern for participation in the 8(a) program.

(b) *Appeal.* A request for re-examination of the initial SBA determination regarding a protest.

(c) *Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD).* The SBA official who is responsible for deciding appeals of disadvantaged status.

(d) *Control.* See § 124.104, title 13, CFR.

(e) *Current Section 8(a) Program Participant.* Any business concern which is approved for participation in the section 8(a) program as of the date on which SBA receives the protest on the solicitation at issue.

(f) *Director, Division of Programs Certification and Eligibility.* For purposes of this section, the term Director shall include the head of the Division of Programs Certification and Eligibility or any individual which he/she designates.

(g) *Division of Programs Certification and Eligibility (DPCE).* The SBA office within the Office of Minority Small Business and Capital Ownership Development which is responsible for making determinations regarding protests of disadvantaged status.

(h) *Economic Disadvantage.* See § 124.106, title 13, CFR.

(i) *Graduation Proceeding.* See § 124.110(k), title 13, CFR.

(j) *Ownership.* See § 124.103, title 13, CFR.

(k) *Protest.* An initial challenge of the disadvantaged status of a business concern.

(l) *Small Disadvantaged Business (SDB) Concern.* A business concern, including mass media:

(1) Which is small as defined pursuant to section (3) of the Small Business Act and implementing regulations at 13 CFR part 121;

(2) Which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals as defined by §§ 124.105 and 124.106, title 13, CFR; or in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals;

(3) Which has the majority of its earnings accruing directly to such individuals; and

(4) Whose management and daily business operations are controlled by one or more of such individuals.

(m) *Social Disadvantage.* See § 124.105, title 13, CFR.

(n) *Suspension Proceeding.* See § 124.113, title 13, CFR.

(o) *Termination Proceeding.* See § 124.112, title 13, CFR.

[54 FR 10272, Mar. 13, 1989, as amended at 59 FR 12816, Mar. 18, 1994]

§ 124.603 Who may protest the disadvantaged status of a concern.

(a) In connection with a specific SDB set-aside requirement or a requirement for which the apparent low bidder is an SDB which has invoked its SDB evaluation preference, the following entities may protest the disadvantaged status of a concern which is the apparent low responsible offeror:

(1) Any other concern which submitted an offer for that requirement;

(2) The procuring agency contracting officer; and

(3) The Small Business Administration.

(b) In connection with an 8(d) sub-contract, the procuring agency contracting officer or SBA may protest the disadvantaged status of a proposed subcontractor. Other small business subcontractors and the prime contractor may submit information to the contracting officer in an effort to persuade the contracting officer to initiate a protest.

(c) Protests of disadvantaged status relating to other Federal procurement

programs, excluding SBA's section 8(a) program, which require SBA to determine social and economic disadvantage as a condition of eligibility, may be filed by the Federal agency official responsible for determining program eligibility, and any other interested party.

§ 124.604 Who makes disadvantaged status determinations.

In response to a protest challenging the disadvantaged status of a concern, the SBA's Director of the Division of Programs Certification and Eligibility (DPCE), or such person as the Director shall designate, in the Office of Minority Small Business and Capital Ownership Development (MSB&COD) shall determine whether the concern is disadvantaged.

[54 FR 10272, Mar. 13, 1989, as amended at 59 FR 12816, Mar. 18, 1994]

§ 124.605 Protest procedures.

(a) *Filing.* (1) Except in cases where the contracting officer or SBA initiates a protest, all protests shall be directed to the procuring agency contracting officer responsible for the particular requirement.

(2) In cases where the contracting officer initiates a protest, he/she shall file the protest with SBA in accordance with paragraph (c) of this section and shall provide notification in accordance with § 124.608 of this part.

(3) In cases where SBA initiates a protest, the protest shall be referred to the Division of Programs Certification and Eligibility within the Office of MSB&COD and notification shall be provided in accordance with § 124.608 of this part.

(b) *Timeliness of Protest*—(1) *SDB Set-Aside and SDB Evaluation of Preference Protest*—(i) *Written SDB Set-Aside Protest.* In order for a written protest submitted by a business concern in connection with a specific SDB set-aside requirement to be considered timely, it must be received by the contracting officer prior to the close of business on the fifth day, exclusive of Saturdays, Sundays and legal holidays, after the bid opening date for sealed bids, or after the receipt from the contracting officer of notification of the identity of

the prospective awardee in negotiated acquisitions.

(ii) *Written SDB Evaluation Preference Protest.* In order for a protest by a business concern to be timely when challenging the SDB status of an apparent low bidder to which an SDB evaluation preference has been applied, it must be received by the contracting officer prior to the close of business on the fifth day, exclusive of Saturdays, Sundays and legal holidays, after the receipt from the contracting officer of notification of the prospective awardee.

(iii) *Oral Protests.* A protest for SDB set-asides or SDB evaluation preferences shall also be considered timely if made orally to the contracting officer within the allotted 5-day period, and the contracting officer thereafter receives a confirming letter postmarked no later than one calendar day after the date of such telephone protest.

(iv) A protest by the contracting officer or SBA shall be timely for the purpose of the SDB acquisition in question whether filed before or after award. However, when a protest is brought by the contracting officer, it must be brought on his or her own behalf stating the grounds for such protest. The contracting officer may not initiate a protest merely by forwarding to SBA the protest of a third party.

(v) A protest received after the time limits set forth above shall not be considered.

(2) *Section 8(d) Protests.* (i) In order for a protest in connection with an 8(d) subcontract to be considered timely, it must be received by the contracting officer prior to the completion of performance by the intended 8(d) subcontractor.

(ii) A protest received after subcontract performance by the intended 8(d) subcontractor shall not be considered.

(3) Protests, in connection with any procurement, which are filed by any person before bid opening or notification of intended award, whichever applies, shall be considered premature and shall not be forwarded to SBA, but shall be returned to the protestor without action.

§ 124.606

(c) *Referral to SBA.* (1) Any contracting officer who receives a timely protest shall promptly forward such protest to the SBA's Director of the Division of Programs Certification and Eligibility, Office of Minority Small Business and Capital Ownership Development, 1441 L Street, NW., Washington, DC 20416.

(2) When a contracting officer receives a protest and refers it to the SBA, such referral shall contain the following:

(i) The protest and any accompanying materials;

(ii) The date on which the protest was received and a determination as to timeliness;

(iii) A copy of the protested concern's self-certification as to disadvantaged status; and

(iv) the date of bid opening or the date on which notification of the apparent successful offeror was sent to all unsuccessful offerors, as applicable.

(3) A protest by a Federal agency in connection with a procurement program requiring SBA to determine social and economic disadvantage as a condition of eligibility shall be accompanied by any materials in the possession of the agency which cause it to question the disadvantaged status of the concern.

[54 FR 10272, Mar. 13, 1989, as amended at 59 FR 12816, Mar. 18, 1994]

§ 124.606 Grounds of protest.

(a) Protests challenging the social disadvantage of the protested concern must demonstrate that the protested concern is not owned and controlled by one or more socially disadvantaged individuals as defined by subpart A of this part. A protest could challenge the social disadvantage of the protested concern by submitting evidence that:

(1) The individuals who own and control the protested concern have not been subjected to, or have overcome racial or ethnic prejudice or cultural bias, or

(2) The individuals associated with the protested concern who could be considered socially disadvantaged do not actually own and control the protested concern.

(b) Protests challenging the economic disadvantage of the protested

13 CFR Ch. I (1-1-98 Edition)

concern must demonstrate that the protested concern is not owned and controlled by one or more economically disadvantaged individuals as defined in subpart A of this part.

§ 124.607 Form and specificity of protest.

(a) No specific form is required for a protest under this subpart.

(b) A protest must be sufficiently specific to provide reasonable notice as to the ground(s) upon which the protested concern's disadvantaged status is challenged and to call into question the disadvantaged status of the protested concern. A protest merely alleging that the protested concern is not disadvantaged, without setting forth any basis for the allegation, will not be deemed to specify adequate grounds for the protest. Some basis for the belief stated in the protest must be given. However, the contracting officer shall forward all protests received to SBA for a decision on whether to pursue the determination of disadvantaged status.

(c) Protests which do not contain sufficient specificity may be dismissed by the SBA.

(d) A dismissal by the Director of DPCE of a protest for lack of specificity may be appealed to SBA's AA/MSB&COD pursuant to § 124.609 of these regulations.

[54 FR 10272, Mar. 13, 1989, as amended at 59 FR 12816, Mar. 18, 1994]

§ 124.608 Notification of protest.

(a) Upon receipt of a protest challenging the disadvantaged status of a concern, the Director of DPCE shall immediately notify the protestor and the contracting officer of the date such protest was received and whether it will be processed or dismissed for lack of specificity.

(b) In cases where the protest is sufficiently specific, the Director of DPCE shall also immediately advise the protested concern of the receipt of the protest and forward to the protested concern a copy of the protest.

(1) In such cases, the Director of DPCE is authorized to ask the protested concern to provide any or all of the following information and documentation: a completed SBA Form

1010A, "Statement of Personal Eligibility" for each individual claiming disadvantaged status; a completed SBA Form 1010B, "Statement of Business Eligibility;" a completed SBA Form 413, "Personal Financial Statement," no older than 60 days, for each individual claiming disadvantaged status; whether the protested concern, or any of its owner(s), officers or directors have applied for admission to or participated in the SBA's section 8(a) program and if so, the name of the company which applied for 8(a) participation and the date of the application; business tax returns for the last two completed fiscal years; personal tax returns for the last two completed fiscal years; personal tax returns for the last two years for all officers, directors and for any individual owning at least 5% of the business entity; business financial statements for the last two completed fiscal years, and current business financial statements no older than 90 days; articles of incorporation, corporate by-laws, or partnership agreements, as appropriate; and any other information which the Director of DPCE deems necessary to permit a determination as to the social and/or economic disadvantaged status of the protested concern.

(2) Unless the protest presents specific information which would call into question the veracity of the application documents filed by a current participant in SBA's section 8(a) program, SBA may allow such a concern to submit, in lieu of the information specified in paragraph (b)(1) of this section, a sworn affidavit by its owner, managing partner, President or Chief Executive Officer that the 8(a) application and any amendments thereto remain accurate, and that circumstances concerning the ownership and control of the business and the disadvantaged status of its principal(s) have not changed since the most recent annual review. If the ownership and/or control of the business have changed since the date of the most recent annual review, the protested concern must comply with paragraph (b)(1) of this section. An affidavit may be allowed only if SBA has conducted an annual review of the 8(a) participant firm during the 12-month period preceding the date on which SBA

receives the protest; and if proceedings to suspend, terminate or graduate the concern from the 8(a) program are not pending.

(3) Notwithstanding the exceptions in paragraph (b)(2) of this section, the Director of DPCE is authorized to request any document which he/she deems necessary to determine disadvantaged status.

(c) Within 10 working days of the date that notification of the protest was received from the Director of DPCE, the protested concern must deliver to the Director of DPCE by hand or by mail the information and documentation requested pursuant to paragraph (b)(1) of this section or the affidavit permitted by paragraph (b)(2) of this section. Materials submitted by mail must be received by the close of business on the 10th working day. Materials, including affidavits, not received by close of business on the 10th working day shall not be considered in deciding the protest.

[54 FR 10272, Mar. 13, 1989, as amended at 59 FR 12816, Mar. 18, 1994]

§ 124.609 Making the disadvantaged status determination.

(a) *General.* The Director of DPCE shall make a disadvantaged status determination within 15 working days after receipt of a protest challenging such status, or as soon thereafter as possible. If, in connection with an SDB acquisition or other procurement requirement, the SBA cannot make such a determination within 15 working days, the Director of DPCE shall inform the contracting officer responsible for the particular requirement when a determination is expected to be made.

(b) *Time Limits for Response.* If the information and documentation requested by SBA under § 124.608(b) is not received by the Director of DPCE within the 10-day period as required by § 124.608(c), SBA may determine the protested concern to be non-disadvantaged.

(c) *Withdrawal of Protest.* Once properly instituted by the filing of a specific disadvantaged status protest, the determination may be completed by the SBA even if the protest is withdrawn or the SDB acquisition or other

procurement requirement in question is cancelled or awarded. The continuation of the disadvantaged status determination is discretionary with the SBA.

(d) *Basis for Determination.* (1) Except with respect to a concern which is a current participant in SBA's section 8(a) program or a concern authorized by § 124.608(b) of this part to submit an affidavit concerning its disadvantaged status, the disadvantaged status determination shall be based on the protest record as supplied by the protestor, protested concern, SBA or others.

(2) If deemed necessary or appropriate, the SBA may make a part of the protest record information in its files and information submitted in response to requests to the protestor, the protested concern, the contracting officer, or other persons for additional specific information.

(3) In determining disadvantaged status, SBA shall review ownership and control of each protested firm as well as social and economic disadvantage regardless of the grounds specified in the protest.

(e) *Disadvantaged Status Determination.* The SBA shall base its disadvantaged status determination upon the record, including reasonable inferences therefrom. SBA shall render a written determination including the basis for its findings and conclusions.

(f) *Summary Determination for Current 8(a) Participant.* The SBA may summarize determine that a concern is socially and economically disadvantaged if that concern is a current participant in the SBA's section 8(a) program so long as SBA has completed an annual review of the concern within the previous 12 month period unless the protested concern cannot submit or fails to submit an affidavit authorized by § 124.608(b) of these regulations. This summary determination shall not apply if suspension, termination, or graduation proceedings are pending against the concern.

(g) *Notification of Determination.* After making its disadvantaged status determination, the SBA shall immediately notify the contracting officer, the protestor, and the protested concern of its determination. No later than one business day thereafter, SBA shall pro-

vide by certified mail, return receipt requested, a copy of its written determination to the protested concern and, consistent with the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552), to all other parties to the proceeding.

(h) *Results of an SBA Disadvantaged Status Determination.* (1) A disadvantaged status determination becomes effective immediately and remains in full force and effect unless and until reversed upon appeal by SBA's AA/MSB&COD pursuant to § 124.610 of this part.

(2) A concern which was determined to be non-disadvantaged may certify itself as a disadvantaged business for purposes of future SDB evaluation preferences, future SDB acquisitions, 8(d) subcontracts, and other Federal procurement programs requiring disadvantaged status as a condition for eligibility provided that it has a good faith belief that it has changed the conditions upon which the determination of non-disadvantaged status was based. At the time of such certification, the concern shall notify the contracting officer that it was previously determined to be non-disadvantaged. However, if such concern is the lowest responsive offeror for an SDB acquisition, or for any requirement by involving its SDB evaluation preference, or is otherwise deemed eligible for a Federal procurement program requiring disadvantaged status as a condition for eligibility, the contracting officer shall treat such certification as a protest of the concern's disadvantaged status and shall forward it to SBA pursuant to § 124.605(c) of this part. SBA shall process a protest based on such certification in accordance with the provisions of this part.

(3) If a current 8(a) participant is found to be non-disadvantaged as a result of failure to submit the affidavit permitted by § 124.608(b)(ii) of this part, or for other cause, the concern will be subject to the same certification and notice requirements specified in paragraph (i)(2) of this section. However, a determination of non-disadvantaged status will not automatically terminate the concern's 8(a) program participation. A hearing before an administrative law judge is required before a

firm can be terminated from the 8(a) program, *see* § 124.112 of this part.

(i) *Misrepresentation of Disadvantaged Status.* (1) A concern which was determined to be non-disadvantaged and which has not overcome or changed the circumstances which caused this determination cannot certify itself to be disadvantaged for future SDB acquisitions, 8(d) subcontracts, and other Federal procurement programs requiring disadvantaged status as a condition for eligibility. A certification of disadvantaged status by such a firm may be deemed a misrepresentation of disadvantaged status.

(2) A concern which was previously determined to be non-disadvantaged and certifies, in good faith, that it is a disadvantaged business for a subsequent SDB acquisition, SDB evaluation preference, 8(d) subcontract, or other Federal procurement program requiring disadvantaged status as a condition for eligibility, must nevertheless inform the contracting officer that it previously had been determined by the SBA to be non-disadvantaged. Failure to advise the contracting officer of such a non-disadvantaged status determination by the SBA may be deemed a misrepresentation of disadvantaged status.

[54 FR 10272, Mar. 13, 1989, as amended at 59 FR 12816, Mar. 18, 1994]

§ 124.610 Appeals of disadvantaged status determinations.

(a) Appeals to re-examine disadvantaged status determinations may be filed with the SBA's AA/MSB&COD by any of the following:

(1) The concern whose disadvantaged status was determined by the Director of OPE;

(2) The original protestor; and

(3) The procuring agency contracting officer responsible for the SDB acquisition or other procurement requirement in question.

(b) Notice of an appeal must be provided to the protested concern, the original protestor, and the procuring agency contracting officer responsible for the SDB acquisition or other procurement requirement in question.

(c)(1) An appeal must be in writing and must be received by the Associate Administrator for Minority Small

Business and Capital Ownership Development, U.S. Small Business Administration, 1441 L Street, NW., Washington, DC 20416, no later than 5 working days after the date of receipt of such determination.

(2) An untimely appeal shall be dismissed.

(d) *Grounds for Appeal.* The SBA will re-examine a disadvantaged status determination only if there was a clear and significant administrative error in the processing of such decision, or if the Director of OPE completely failed to consider a significant fact contained within the materials supplied by the protestor or the protested concern. Disadvantaged status determinations shall not be re-examined based on additional information or changed circumstances which were not disclosed to the Director of OPE at the time of his/her decision.

(e) No specific form is required for the appeal. However, the appeal must identify the disadvantaged status determination for which a re-examination is sought, set forth a full and specific statement of the reasons as to why the disadvantaged status determination is alleged to be erroneous pursuant to paragraph (d) of this section, and present arguments in support of such allegations.

(f) An appeal may proceed to completion even though an award of the SDB acquisition or other procurement requirement which prompted the initial protest has been made. In such a case, however, a reversal by the AA/MSB&COD shall not apply to the awarded SDB acquisition or other awarded procurement requirement and shall have future effect only.

(g) The appeal will be decided by the AA/MSB&COD within 5 working days of its receipt, if practicable.

(h) The appeal decision shall be based on all the information and documentation in the record. A copy of the decision shall be provided to the protested concern by certified mail, return receipt requested. To the extent consistent with the Privacy Act and the Freedom of Information Act, all parties to the proceeding shall be notified of SBA's final decision.

(i) The decision of the AA/MSB&COD is the final decision of the Small Business Administration.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

Sec.

- 125.1 Programs included.
- 125.2 Prime contracting assistance.
- 125.3 Subcontracting assistance.
- 125.4 Government property sales assistance.
- 125.5 Certificate of Competency Program.
- 125.6 Prime contractor performance requirements (limitations on subcontracting).

AUTHORITY: 15 U.S.C. 634(b)(6), 637, and 644; 31 U.S.C. 9701, 9702.

SOURCE: 61 FR 3312, Jan. 31, 1996, unless otherwise noted.

§ 125.1 Programs included.

The regulations in this part relate to the Government contracting assistance programs of SBA. There are four main programs: Prime contracting assistance; Subcontracting assistance; Government property sales assistance; and the Certificate of Competency program. The objective of the programs is to assist small businesses in obtaining a fair share of Federal Government contracts, subcontracts, and property sales.

§ 125.2 Prime contracting assistance.

(a) *Traditional PCR responsibilities.* (1) SBA Procurement Center Representatives (PCRs) are located at Federal agencies and buying activities which have major contracting programs. PCRs review all acquisitions not set aside for small businesses to determine whether a set-aside would be appropriate. In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal to the secretary of the department or head of the agency. The procedures and time limits for such appeals are set forth in § 19.505 of the Federal Acquisition Regulation (FAR) (48 CFR 19.505).

(2) PCRs review and evaluate the small business programs of Federal agencies and buying activities and make recommendations for improvement. They also recommend small business, small women-owned business, and small disadvantaged business sources for use by contracting activities and assist these businesses in obtaining Federal contracts and subcontracts. Other authorized duties of a PCR are set forth in the FAR in 48 CFR 19.402(c) and in the Small Business Act (the Act) in Section 15(a) (15 U.S.C. 644(a)).

(b) *BPCR responsibilities.* (1) SBA is required by section 403 of Public Law 98-577 (15 U.S.C. 644(l)) to assign a breakout PCR (BPCR) to major contracting centers. A major contracting center is a center that, as determined by SBA, purchases substantial dollar amounts of other than commercial items, and which has the potential to achieve significant savings as a result of the assignment of a BPCR.

(2) BPCRs advocate full and open competition in the Federal contracting process and recommend the breakout for competition of items and requirements which previously have not been competed. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures set forth in § 19.505 of the FAR (48 CFR 19.505). BPCRs also review restrictions and obstacles to competition and make recommendations for improvement. Other authorized functions of a BPCR are set forth in 48 CFR 19.403(c) of the FAR and Section 15(l) of the Act (15 U.S.C. 644(l)).

§ 125.3 Subcontracting assistance.

(a) The purpose of the subcontracting assistance program is to achieve maximum utilization of small business by major prime contractors. The Act requires other-than-small firms awarded contracts that offer subcontracting possibilities by the Federal Government in excess of \$500,000, or \$1 million for construction of a public facility, to submit a subcontracting plan to the contracting agency. The FAR sets forth the requirements for subcontracting plans in 48 CFR part 19, subpart 19.7, and 48 CFR 52.219-9.